Read

SUPREME COURT OF THE UNITED STATES.

No. ~~151.~~ 80.

GEORGE SMITH, APPELLANT,

vs.

JOHN J. ORTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

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1 Circuit court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukie, in said district of Wisconsin, on the first Monday (being the sixth day) of July, A. D. 1863. Present, the honorable Andrew G. Miller, district judge, presiding; Darius C. Jackson, marshal; John M. Miller, clerk. Among other the following proceedings were had, to wit:

GEORGE SMITH, complainant,
vs.
JOHN J. ORTON, defendant. } In equity.

Be it remembered that heretofore, to wit, on the fifth day of July, A. D. 1856, came the said complainant, George Smith, by his solicitors, Messrs. Brown & Ogden, and filed his bill of complaint against the said defendant, John J. Orton, in the district court of the United States for the district of Wisconsin, as follows:

2 UNITED STATES OF AMERICA.

District court of the United States for the district of Wisconsin.—In chancery.

To the judge of the district court of the United States for the district of Wisconsin:

George Smith, of the city of Chicago, in the State of Illinois, and a citizen of the State of Illinois, brings this his bill against John J. Orton, of the county of Milwaukie, in the State of Wisconsin, and a citizen of the State of Wisconsin.

And thereupon your orator complains and says, that heretofore, to wit, on or about the 14th day of July, A. D. 1848, one Cyrus D. Davis was lawfully seized of the legal estate in fee simple of the following premises, to wit: lots number seven and eight, in section number nine, in township number seven north, of range number twenty-two east, except three acres before that time conveyed to one Peter Boerg, by the said Davis, in said district; that the said Davis was so seized of said premises in trust for one Otis Hubbard, (now deceased,) and for his use and benefit, and neither had or claimed to have any interest therein for himself; that the said Hubbard likewise claimed the beneficial interest in lots number five and six, in block number forty-three, in the second ward of the city of Milwaukie; and upon the advice and solicitation of one Tertullus D. Butler, who was a connexion of the said Hubbard, made an arrangement with one Joseph Schram to sell to him, said Schram, a part of said lots last
3 mentioned.

And your orator further shows that, as he is informed and believes, the said Hubbard, although at that time capable in the law of transacting business, was nevertheless injured in his mind and in his business capacity by age and habitual intemperance, and could be very easily imposed upon and cheated by one in whom he had confidence; that he had great confidence in the said Butler as a friend and family connexion, and desired to sell said lots in consequence of the advice of the said Butler, as aforesaid, and trusted the entire management of the sale to the said Butler; that, as your orator is informed and

believes, the said Schram agreed to pay one thousand dollars for said part said lots in said block, but would not pay said money without either actual receiving a good and sufficient conveyance of said lots, or security therefore, that the legal title to said lots was in certain relations of the said Hubbard, residing out of the State of Wisconsin, and partly in the State of Massachusetts, and partly in New York, and deeds from them could not be procured without some delay; that the said Butler, being anxious to receive a portion of the purchase-money to use in his own business, proposed to give security to the said Schram that a good title should be vested in him; that, with this view, he induced the said Hubbard to speak with one David Knab, and ask him to give security for him, the said Hubbard, in the premises; that the said Hubbard did speak with the said Knab on the subject, and proposed to secure the said Knab upon said premises first above mentioned, the legal title to which was in the said
4 Davis, as aforesaid; that the said Butler afterwards spoke to the said Knab on the same subject, and the said Knab agreed to sign a bond with the said Butler upon receiving security as aforesaid; that afterwards, to wit, on the twenty-first day of July, A. D. 1848, the said Hubbard applied to the said Davis for a deed of said premises first hereinbefore mentioned running to the said Knab, and the said Davis, at the request of said Hubbard, and for the reason that the said Hubbard was the sole owner of said premises, as aforesaid, and for no other consideration, executed and acknowledged a quit-claim deed, bearing date the day and year last aforesaid, conveying said premises to the said Knab in fee simple, and delivered the same to the said Hubbard.

And your orator further shows that, on the next day, to wit, on the twenty-second day of July, the said Knab, at the request of said Butler, went to the office of Hemenway, Ripley and Wells, and there, with said Butler, executed a bond by which they bound themselves to procure, within three months from that date, a good title to said part of said lots in said block to themselves, and to convey the same to the said Schram, by deed with covenants of warranty, (he, the said Schram, executing a mortgage thereon for the sum of three hundred and fifty dollars,) as by reference to a copy of said bond, hereunto annexed, and marked (A,) and made part of this bill, will more fully and at large appear.

And your orator further shows, that the said deed from the said Davis was then and there delivered to the said Knab for security as aforesaid, and
5 the said Knab then and there executed an instrument in writing, bearing date on the said 22d day of July, (a copy of which said instrument is hereunto annexed, marked (B,) and made part of this bill,) by which he bound himself unto the said Butler in the penal sum of two thousand dollars, that upon the performance by the said Butler, at his own cost and charges, of all and singular the agreements of the said Butler and Knab in the said bond to the said Schram mentioned, (except as to the said deed from Butler and Knab,) he, the said Knab, would convey the said premises so conveyed to him by the deed of the said Davis, as aforesaid, to the said Butler, it being recited in said instrument that the said Knab was surety for the said Butler, obligee, as aforesaid.

And your orator further shows that the said Knab (as your orator is informed and believes) signed said instrument without knowing the contents thereof, and without knowing that it so run to the said Butler, as aforesaid, without having the nature thereof explained to him, and without any previous agreement or understanding to that effect, but at the request of the said Butler, and under the supposition that the papers were all properly drawn, and never acknowledged said instrument, except by the mere signing, as aforesaid, in the presence of a notary public, who was then present; that the said Butler never paid the said Knab anything for signing it, and that the said Knab never paid anything to the said Davis for his said deed, and never claimed any other right to said premises described in said deed than as security, as aforesaid. And your orator further shows that under the statutes of the Territory of Wisconsin, at that time in

force in the State of Wisconsin, the said deed and instrument in writing together show that the title of the said Knab was in the nature of a mortgage, and constituted a mortgage, to secure him against said bond, given to the said Schram, as aforesaid, and that the equity of redemption was in the said Davis, by virtue of his previous legal title, and in the said Hubbard, by virtue of his equitable title, as aforesaid, and that the said Butler, independently of the fraud, did not nor could acquire any right to said premises.

And your orator further shows that the said Knab left the said bond and other instrument in writing lying on the table in the said office, and on the same day caused the said conveyance to him to be recorded as a deed, in the office of the register of deeds of said county; that the said Hubbard was not present at the time said bond and other instrument in writing were signed, and that said Knab never delivered them, or knew what became of them, until a period long subsequent.

Your orator further shows that he is informed and believes the said Schram then and there paid to the said Butler five hundred dollars, part of the consideration money for the purchase of said premises, in said block 43; and that said Butler never caused said instruments in writing, signed by the said Knab, to be recorded, and that the said Hubbard remained in ignorance of it until a period long subsequent, having been induced to believe that said Knab, who was known to him (said Hubbard) as a man of honor and integrity, in whose word for the reconveyance of said lot implicit credit and reliance could be placed, had
7 not given any instrument for the reconveyance of the same.

And your orator further shows that he is informed and believes, and so charges, that said Butler never fulfilled the condition of said bond, signed by him and the said Knab, and never performed the agreements therein contained, but that the said Hubbard long (to wit, more than a year) after the time limited therefor in said bond, procured deeds to himself from his said trustees, and did thereafter convey said premises in said block 43 to the said Schram; that neither the said Butler or the said Knab ever acquired or had any title or interest in the premises, or conveyed any to the said Schram; that the said premises were for a long period after the same were conveyed to the said Hubbard, by his said trustees, subject to the lien of a judgment against the said Hubbard, and the said Schram held the said bond of the said Butler for more than two years with its conditions unperformed, and the penalty thereof forfeited according to its terms, and with a full right of action therein against the said Knab and Butler; that after the assignment of the said Butler to the said Orton, hereinafter mentioned, the said Orton in some way agreed to indemnify the said Schram against incumbrances on his title, and procure either a surrender or assignment of said bond so given by the said Butler and Knab to the said Schram.

And your orator further shows that on or about the fourteenth day of March, A. D. 1851, the said Butler executed an assignment to the said Orton of
8 said instrument in writing, signed by said Knab, and running to said Butler, as aforesaid, and acknowledged the same; that the said Orton immediately caused the said bond to be recorded, together with said assignment, in volume thirty-two of deeds, on pages four hundred and sixty-six and four hundred and sixty-seven, in the office of the register of deeds of Milwaukie county, aforesaid.

And your orator further shows that he is informed and believes that said Butler, in all his said transactions, in relation to the sale of said lots to said Schram, and to the conveying of said premises to the said Knab by way of security, and to the said instrument in writing and the said assignment, acted fraudulently, violating the trust reposed by the said Hubbard in him as a friend, a connexion, and an agent, and taking advantage of the mental weakness of the said Hubbard for the purpose of defrauding him and of obtaining the property of the said Hubbard to himself, the said Butler. Your orator therefore charges

that, as against said Hubbard and the said Knab, the said instrument so assigned by the said Butler to said Orton was and is a nullity. And your orator further shows that the said Hubbard, on the seventh day of June, A. D. 1851, still having the entire beneficial interest in said lots 7 and 8 in said section, did, for a good and valuable consideration, on the day and year last aforesaid, duly execute, acknowledge, and deliver a deed conveying said premises in fee simple to one Joachim Gruenhagin, by which said Gruenhagin became seized in fee simple of the entire estate of the said Hubbard in said premises, both in law and equity; that the said Gruenhagen did afterwards, to wit, on the 31st day of December, A. D. 1852, by a good and valid conveyance, convey the same to one
9 James S. Brown in fee simple; and the said Brown did afterwards for a valuable consideration, by a good and sufficient deed, dated on or about the first day of January, A. D. 1853, convey the same in fee simple to your orator; that afterwards, on or about the first day of February, A. D. 1853, the said Cyrus D. Davis, at the request of Increase A. Lapham, administrator of the estate of said Hubbard, then deceased, and because your orator was grantee as aforesaid of the said Hubbard, and because the said Davis acknowledged and recognized the right of the said Hubbard to dispose of all the title and interest in said property standing in the name of him, said Davis, executed and delivered to your orators a good and sufficient deed conveying to your orator the entire estate of the said Davis in said premises.

And your orator further shows that he is informed and believes that the said Hubbard in his lifetime, in ignorance of the existence of the said instrument in writing in the hands of said Butler, and considering said Knab as simply surety for himself, and desirous both of releasing his said surety and of obtaining title to said premises so conveyed to the said Knab as aforesaid, and without any new consideration, conveyed said part of said lots, in said block 43, to the said Schram, and that all judgments not paid off by said Hubbard in his lifetime were subsequently paid off by his administrator, and partly out of the funds received by said administrator from the grantors of your orator on account of said premises; that the said Hubbard, after he had learned by the recording of said instrument, running to said Butler as aforesaid, that the same had been given and assigned to the said Orton, and after he had so conveyed said pre-
10 mises to the said Gruenhagen, as aforesaid, for the purpose of avoiding any defence which might be made by the said Gruenhagen to the payment of a part of the consideration money for said purchase, and by arrangement with him, filed a bill in the circuit court of the county of Milwaukie, on the chancery side, against said Butler, Orton, and Knab, praying, among other things, an injunction against any conveyance of the said premises to said Orton, and for a conveyance from the said Knab to himself, upon which said bill a preliminary injunction, as aforesaid, was allowed by the said court; that the said Orton within a few days after the commencement of said suit against him filed his original bill in said court, on the chancery side, against said Knab alone, claiming and setting forth, among other things, that said Knab, upon the day of the date of said instrument, so signed by him as aforesaid, was seized of a good and perfect title in fee simple in said premises, and the said Butler as purchaser entered into said contract with him, said Knab, and that said Butler and Orton had fulfilled the condition and performed the consideration mentioned in said instrument, upon which said Knab therein agreed to convey the same, and mentioning no other consideration as paid for said premises by said Butler, and claiming for him no other character than as purchaser from said Knab by virtue of said instrument; that the said Knab filed an answer, not denying or putting in issue directly said obligation that the said Butler and Orton had fulfilled the condition mentioned in said instrument upon which said premises should be conveyed as aforesaid, but setting up, among other things, that he held the premises merely by way of security and as the prope ty of the said Hubbard; that he had received notice

11 from said Hubbard that the property was his, (said Hubbard's,) and not to convey to said Orton, and that he, said Knab, did not care to whom he conveyed, and submitted the matter to the court, praying, however, that said Hubbard might be made a party.

And your orator further shows that said suit, commenced by said Hubbard as aforesaid, was, after his death, discontinued, for the reason that the complainant had parted with his interest as aforesaid before the commencement of said suit, and therefore no testimony was ever taken in it; that your orator induced said Knab to take testimony in said suit of Orton *vs.* him, (Knab,) for the purpose of forcing said Orton to make your orator a party to said suit, so that a proper defence and proper pleadings might be put in to said suit; but the said Orton did not nor would make your orator, or any assignee or representative of the said Hubbard, a party, but persisted in forcing the same on to a hearing upon the pleadings as they stood, and without any party in interest being a party to the defence.

And your orator further shows that while said suit of the said Orton was so pending, as aforesaid, the right of your orator as purchaser under the said Hubbard to demand a deed and release from the said Knab of said premises, (the interest of said Knab therein by way of security having been satisfied by said Hubbard, and those representing him as aforesaid,) became perfect, and could not be defeated or affected by the ex parte act of said Orton in filing said bill against said Knab, and making him alone a party; that the said Knab was under no injunction in that cause against conveying said premises, and by a refusal would have rendered himself liable to a suit from your orator to enforce a deed; that the said Knab for these reasons, and because he fully recognized the understanding and agreement that the property was the property
12 of the said Hubbard, subject only to his, said Knab's, right by the way of security, on or about the first day of February, A. D. 1853, executed and delivered to your orator a deed conveying said premises to him in fee simple, whereby the mortgage and legal interest of the said Knab was extinguished and released.

And your orator further shows that subsequently, in the fall of the year 1853, said suit of the said Orton against said Knab came on to a hearing, and was by said court dismissed without prejudice, for the reason that neither said Hubbard or those claiming under him had been made parties to said suit, as by said proceeding and the record thereof now remaining in said court, or a copy thereof, now here ready to be produced as this court shall direct, will more fully and at large appear; and that by virtue of the premises, upon the dismissal of said cause your orator became and was then and there the absolute owner in fee simple of said premises, with full right to sell and convey the same, and that his title could not be defeated or affected by any proceeding between third persons to which he was not a party.

And your orator further shows that, as he is informed and believes, in about sixty days after said cause was so dismissed, as aforesaid, the said Orton commenced his proceedings in the supreme court of the State of Wisconsin, by the way of appeal from said order of dismissal, so made and entered by the circuit court, as aforesaid; in which said appeal the said Orton was appellant, as aforesaid, and the said David Knab was sole appellee and party defendant; and that afterwards, on or about the month of September, A. D. 1854, the said supreme court entered a decree reversing the said order of the circuit court aforesaid, and directing the said Knab to execute a deed of said premises, or in default
13 thereof, that one H. L. Palmer should, as commissioner of the court, execute such deed for him, (the said Knab,) and assigning as a reason for said reversal and decree (among other things) that the said Knab had no interest in the defence of fraud, and having acknowledged by his answer that his interest

by way of security in said premises had been satisfied, it did not concern him whether the complainant and Butler had practiced a fraud upon Hubbard or not.

And your orator further shows that the said H. L. Palmer did, upon the refusal of the said Knab, execute a deed under said decree, purporting to convey to said Orton said premises in fee simple, as by the records of said supreme court (a copy of which is now here ready to be produced) will more fully and at large appear.

And your orator further shows that said premises are, and for the last two years have been, unoccupied and unenclosed, and that the possession thereof is in the law with the party having the legal title thereto, and that they are of great value, to wit, of the value of ten thousand dollars or more.

And your orator further shows that he claims that said proceedings of the said Orton against said Knab alone were and are a fraud upon the rights of your orator, and those under whom he claims title as aforesaid, and that if any portion of the legal title of said premises passed to said Orton by virtue of said decree of said supreme court, and of said deed from said Palmer, it passed in trust for the use and benefit of your orator, and subject to all the rights existing in said Hubbard and Davis, and your orator as purchaser as aforesaid from said Hubbard and Davis, against either said Knab or said Butler; that said Orton did not nor could by virtue of said proceedings acquire any
14 other or greater rights in equity than said Butler himself had, or than said Knab; that said Butler receiving a deed from said Knab would have been merely trustee for those under whom your orator claims, and the said Orton is in the same or no better position.

And your orator further shows that the said Orton was, when he so took an assignment of said bond as aforesaid, an attorney by profession, and, as your orator is informed and believes, examined the records in the office of the register of deeds of Milwaukie county, and must have there discovered that the said Butler had performed none of the conditions upon which, under said instrument, so assigned as aforesaid, all right to a deed depended, but that, on the contrary, all consideration mentioned or referred to in said instrument for said deed had moved from the said Hubbard.

And your orator further shows that the said Orton now gives out and claims that he is the legal and equitable owner of said premises in said section nine by virtue of said assignment and said decree, and that your orator has no right or interest in the same, either in law or equity, and utterly refuses to recognize or allow any interest in your orator therein, whereby your orator has been greatly injured, and a cloud has been cast over his title to said premises, and he otherwise greatly injured in the use and enjoyment thereof, and is prevented from making sale of them.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may upon his corporal oath full, true, direct and perfect answer make to such of the interrogatories hereafter numbered and set forth, as by the note hereunder written he is required to answer, that is to say:

First. Whether the said Butler assigned the said instrument in writing, signed by the said Knab, and running to the said Butler, as aforesaid, to the said Orton?

15 Second. Whether said Butler caused said instrument in writing and assignment to be recorded, as set out in this bill?

Third. Whether the said Orton has set up a claim of title or beneficial interest in said premises in himself?

Fourth. Whether said Orton, at the time he took said assignment, was an attorney by profession?

And that on the final hearing of this cause the said instrument, so assigned as aforesaid, be declared fraudulent and void as against your orator, and the said

Orton be decreed to release all claim or interest in said lots in said section No. nine, and be forever barred and enjoined by the order and decree of this court from setting up or asserting any claim or right to the said premises, and be decreed to pay all the costs of your orator in this behalf most wrongfully sustained; and that your orator may have such other or further relief in the premises as may be agreeable to equity and good conscience; and that until the final hearing of this cause the said Orton may be restrained by the injunction of this honorable court from assigning, or disposing of, or conveying said premises, or any part thereof.

May it please your honor, the premises considered, to grant unto your orator the most gracious writ of subpœna issuing out of and under the seal of this court, directed to the said John J. Orton, therein and thereby commanding him
16 at a certain time, and under a certain penalty therein to be specified, to be and appear before this honorable court, and then and there to stand to perform and abide by such order, direction, and decree in the premises as to your honor may seem meet.

And your orator will ever pray, &c.

GEORGE SMITH,
By his att'y, ALEX. MITCHELL.

BROWN & OGDEN, *Sol'rs for Compl't.*
THOMAS L. OGDEN, *of Counsel.*

DISTRICT OF WISCONSIN, *ss:*

On this 26th day of June, A. D. 1856, before me, personally came Alexander Mitchell, who, being duly sworn, deposeth and saith, that George Smith, the complainant in the foregoing bill of complaint, is not a resident of the State of Wisconsin, nor now in said State; that the affiant is the duly authorized agent of the said George Smith; that this affiant has read the foregoing bill of complaint and knows the contents thereof, and has information as to all the matters stated therein, and, from such information, he believes said matters to be truly stated, and the bill to be true.

D. A. J. UPHAM,
Com. U. S. Dis. Court., Dist. of Wisconsin.

NOTE.—The defendant, John J. Orton, is required to answer interrogatories numbered 1, 2, and 3, and 4.

BROWN & OGDEN,
Solicitors, &c.

17 A.

Tertullus D. Butler and David Knabb to Joseph Schram. Bond recorded, vol 24 of Deeds, on pages 424 and '5.

Know all men by these presents, that we, Tertullus D. Butler and David Knabb, of the city of Milwaukee, and State of Wisconsin, holden and stand firmly bound unto Joseph Schram, of the same place, in the full and just sum of two thousand dollars, lawful money, to be paid unto the said Joseph Schram, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, each and every of them, firmly by these presents. Witness our hands and seals, dated the twenty-second day of July, in the year of our Lord one thousand eight hundred and forty-eight.

Whereas the said Butler and Knabb, for and in consideration of the sum of nine hundred dollars, have agreed to convey to said Schram the following real estate, situated in the second ward of said city of Milwaukee, viz: a part of lots five (5) and six (6), in block forty-three (43), commencing on Chestnut street

twenty-five feet east of the northwest corner of said lot five (5); thence south one hundred and twenty feet (120); thence west, parallel with the north line of said lots, twenty-five feet (25) to the west line of said lot five (5); thence north on said west line sixty (60) feet; thence west, parallel with the north line of said lot six, (6,) ten (10) feet; thence north, parallel with the east line of said lot six, (6,) sixty feet, to the north line of said lot six (6); thence east
18 thirty-five (35) feet along the north line of said lots five and six (5 and 6) to the place of beginning; being twenty-five feet front on Chestnut street by one hundred and twenty-five feet deep of said lot five, (5,) and ten feet front on Chestnut street by sixty feet deep of said lot six (6):

And whereas the title to said premises above described is now in Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, and the said Butler and Knabb have agreed to procure from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard a deed of the said premises to themselves, the said Butler and Knabb, and to do such further acts as may be necessary to make the title to said premises free and clear of all and every incumbrance or incumbrances in themselves, the said Butler and Knabb; and whereas the said Butler and Knabb have, for the consideration above mentioned, agreed to convey to said Schram, his heirs and assigns forever, the above premises, by a good and sufficient deed in the law, in fee simple, with full covenants of warranty against all and every incumbrance or incumbrances, of what name and kind soever, except a lease of said premises for the term of one year from the first day of May, A. D. 1848; said deed to be executed within three months from the date hereof, and to be delivered to said Schram, upon the execution by said Schram and delivery to said Butler and Knabb of a mortgage upon said premises for the sum of three hundred and fifty dollars, payable in eighteen months from the date hereof, with seven per cent. per annum interest:

And whereas said Butler and Knabb have further agreed that said Schram shall have immediate possession of said premises, subject to said lease above mentioned: Now the condition of this obligation is such, that if the said
19 Butler and Knabb shall procure a deed as above mentioned from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard within three months from the date hereof, and shall convey the said premises to said Schram, as above agreed, and shall well and truly perform all their agreements in this instrument contained, then this obligation to be void; otherwise to remain in full force and virtue.

T. D. BUTLER. [SEAL.]
DAVID KNABB. [SEAL.]

Signed, sealed, and delivered in presence of—
FRANKLIN RIPLEY.
CHARLES D. WELLS.

STATE OF WISCONSIN,
Milwaukee County, ss:

On this 22nd day of July, A. D. 1848, personally came before me Tertullus D. Baker and David Knabb, to me known to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed, for the uses and purposes therein mentioned.

FRANKLIN RIPLEY,
Notary Public.

Recorded July 22d, A. D. 1848, at 2½ o'clock p. m.

B.

David Knabb to Tertullus D. Butler.

Know all men by these presents, that I, David Knab, of the city and county of Milwaukee, Wisconsin, am held and firmly bound unto Tertullus D. Butler, of the same place, in the sum of two thousand dollars, lawful money, for
20 the payment of which sum, well and truly to be made to said Butler, his heirs, executors, administrators, and assigns, I bind myself, my heirs, executors, and assigns, each and every of them, firmly by these presents. Sealed with my seal, dated this twenty-second day of July, A. D. 1848.

Whereas the said Knabb has, jointly with said Butler, executed to one Joseph Schram a bond with even date herewith, wherein said Butler and Knab bind themselves, their heirs, &c., to execute to said Schram a deed of a part of lots five and six, (5 and 6,) in block forty-three, (43,) in the second ward of said city of Milwaukee, for a more particular description of which premises reference may be had to said bond. And whereas said Butler and Knab, in said bond, further agreed to procure a deed of said premises, in said bond described, from Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard to themselves, the said Butler and Knabb, before said Butler and Knab should execute the deed, as above mentioned, to said Schram:

And whereas said Butler and Knab in said bond made certain other agreements to and with said Schram, for which agreements, and for a full explanation of all the agreements of said Butler and Knab with said Schram, reference is hereby made to said bond:

And whereas the said Knab executed said bond with said Butler to said Schram as security for said Butler, for the performance of the covenants and agreements on the part of said Butler and Knab in said bond contained:

And whereas said Butler has agreed to procure the deed from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard to said Butler and Knabb, as in said bond mentioned, at the proper cost and expense of
21 himself, the said Butler: And whereas the said Butler has agreed to save the said Knab harmless from all damage, costs, charges, or expenses from or on account of said bond: And whereas said Butler has agreed to perform, at his own cost, all the agreements which said Butler and Knab in said bond have obligated themselves to perform:

And whereas said Knabb, in consideration that the said Butler shall at his own costs and expenses procure the deed above mentioned from said Emily Hubbard, Julia Baker, Emily Jewell, and Lewis F. Hubbard. and shall at his, the said Butler's, own costs and expenses, perform all the agreements which said Butler and Knab in said bond have obligated themselves to perform, except wherein said Butler and Knab agree to execute to said Schram a deed of said premises, which said Butler and Knab are both to execute, has agreed to convey to said Butler the following described real estate, viz: Lots seven (7) and eight (8) of section nine (9), in township No. seven (7) north, of range No. twenty-two (22) east, in the district of lands subject to sale at Milwaukee, Wisconsin, except three acres of said tract of land heretofore sold by Cyrus D. Davis:

Now, therefore, the condition of this obligation is such, that if on the performance on the part of said Butler of his agreements, as in this bond mentioned, said Knab shall execute to said Butler, his heirs and assigns, a deed of said last described premises, free and clear of all incumbrances suffered by, through, or under him, the said Knab, then this obligation to be void; otherwise to be in full force, power, and virtue.

DAVID KNAB. [SEAL.]

In presence of—
F. RIPLEY, CHAS. K. WELLS.

22 STATE OF WISCONSIN,
Milwaukee County, ss:

On this 22d day of July, A. D. 1848, before me personally appeared David Knab, to me known to be the person who executed the foregoing bond, and acknowledged the same to be his free act and deed.

FRANKLIN RIPLEY,
Notary Public.

Whereupon a subpœna issued, as follows:

23 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

[SEAL] The President of the United States of America, to John J. Orton, greeting:

You are hereby commanded, that you personally appear before the judge of the district court of the United States of America for the district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of August next ensuing, at Milwaukee, to answer to a bill of complaint, exhibited against you in our said court, by George Smith; and to do further, and receive what our said court shall have considered in that behalf. And this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said John J. Orton, if to be found in his district, and due return thereof make.

Witness the honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin, at the city of Milwaukee, in the said district, this fifth day of July, in the year of our Lord one thousand eight hundred and fifty-six, and of our independence the eighty-first.

B. K. MILLER, *Clerk.*

BROWN & OGDEN, *Solicitors.*

It is ordered by our said court, that the said John J. Orton, the defendant aforesaid, do enter his appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise the bill filed may be taken as confessed.

24 And afterwards, and on or before the return day of said subpœna, came the said marshal and returned the same, with his return endorsed thereon, as follows:

Return.

"This writ served personally on the within named John J. Orton, by showing him the original, and giving him a copy thereof. July 8th, 1856.

S. V. R. ABLEMAN, *Marshal,*
By GEO. COGSWELL, *Deputy.*"

And afterwards, to wit, on the 21st day of July, 1856, came the defendant, by his solicitor, Mr. Manrier, and filed his appearance, as follows:

Appearance.

United States district court, district of Wisconsin.—In equity.

GEORGE SMITH
vs.
JOHN J. ORTON.

Please enter my appearance for the defendant in the above entitled cause.

Yours, &c.,

E. MANRIER, *Def't's Solicitor*

B. K. MILLER, Esq., *Clerk.*

And afterwards, to wit, on the 1st day of September, 1856, came the defendant, by his solicitor, and filed his demurrer, as follows:

Demurrer.

District court of the United States for the district of Wisconsin.

The demurrer of John J. Orton to the bill of complaint of George Smith:

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill to be true, in manner and form
25 therein alleged, demurs thereunto, and, for cause of demurrer, showeth:

First. That it appears, from said bill, that the said defendant, before the filing of the bill of complaint in this cause, impleaded the said David Knab in a certain suit in equity, in the circuit court of Milwaukee county, State of Wisconsin, praying a specific performance of the condition of said bond, executed by said Knab to said Butler, and by him assigned to this defendant, in which suit a decree for a specific performance has been rendered against said Knab, and a deed of the premises, described in said bond, executed to this defendant; and that, during the pendency of said suit, the said complainant purchased the interest of said Knab in said premises, and became a privy in estate in said premises, and is bound by such decree.

Second. That said bill sets out two cases for relief, which are inconsistent with each other, and is double.

That the complainant has not made or stated such a case, in his said bill, as entitles him to relief in a court of equity against this defendant. Whereupon this defendant demands judgment of this court whether he shall be compelled to make further or other answer to said bill, or the matters therein stated, and prays to be hence dismissed with his costs in this behalf sustained.

E. MANRIER, *Def't's Sol'r.*

I hereby certify that, in my opinion, the above demurrer is well founded in point of law.

WM. P. LYNDE, *of Counsel.*

DISTRICT OF WISCONSIN, *ss:*

26 John J. Orton, being duly sworn, says, that the above demurrer is not interposed for purpose of delay.

J. J. ORTON.

Subscribed and sworn before me this 30 day of August, 1856.

WINFIELD SMITH,
U. S. Commissioner.

Rule to plead.

October 6, 1856.—On motion of Brown & Ogden, solicitors for the complainant, it is ordered that the defendant in this cause appear and plead and answer, or demur, to said complainant's bill of complaint by the first Monday of November, or said bill will be taken as confessed against him.

October 13. 1856.—On motion of Brown & Ogden, solicitors for the complainant, it is ordered by the judge that the time to set the demurrer, filed in said cause, down for hearing, be extended to the next rule day, the same being inclusive.

November 3, 1856.—On motion of Brown & Ogden, solicitors for the complainant, it is ordered that the demurrer filed by the defendant in this cause be, and the same is, set down for argument according to the rules and practice of this court.

January 12, 1857.—This day came the defendant, by his solicitor, and filed amendment to his demurrer, as follows:

U. S. district court.—In equity.

GEORGE SMITH
vs.
JOHN J. ORTON.

And now comes the said defendant, by his solicitor, and leave thereto
27 being first had and obtained, doth assign as an additional cause of demurrer, in the above entitled cause, that it doth appear from the said bill of complaint that the said complainant is not in actual possession of the premises in said bill described, and prays, as in and by his demurrer aforesaid he has already prayed.

E. MANRIER, *Def't's Sol'r.*

Demurrer sustained and bill dismissed.

February 3, 1857.—This day this cause came on to be heard on the demurrer of the defendant to the complainant's bill of complaint, and was submitted by the counsel of the parties without argument. On consideration whereof, it is ordered by the court, that the said demurrer be, and hereby is, sustained. And it is further ordered, adjudged, and decreed that the said bill of complaint be, and hereby is, dismissed, but without prejudice, and that the said complainant pay the costs to be taxed, and, in default thereof, that an execution be issued against him for the same.

A. G. MILLER.

Appeal.

February 4, 1857.—This day came the complainant, by his counsel, and presented his petition, praying an appeal to the Supreme Court of the United States. Whereupon it is ordered by the court that an appeal be and is allowed, and that the complainant file in this court a bond, to be approved, in the penalty of five hundred dollars, with one surety, conditioned to pay the costs of the appeal, and to abide the order of the said Supreme Court.

February 6, 1857.—Appeal bond filed and citation issued.

28 Citation returned. The above citation served on the above named John J. Orton, by showing him the original, and giving him a copy thereof.

S. V. R. ABLEMAN, *Marshal,*
By GEORGE COGSWELL, *Deputy.*

Fees, $2 26.

George Cogswell, deputy United States marshal for the district of Wisconsin, being duly sworn, says that he served the above citation as above stated.

GEORGE COGSWELL.

Subscribed and sworn to before me this first day of April, A. D. 1857.

J. L. HATHAWAY,
Clerk Dist. Court of the U. S. for the Dist. of Wisconsin.

July 31, 1857.—Certified copy of record forwarded to the clerk of the Supreme Court of the United States.

Mandate from Supreme Court.

October 3, 1859.—This day came the complainant, by his counsel, and presented to the court a mandate from the Supreme Court of the United States, that it was ordered, adjudged, and decreed, that the decree of this "court in this cause be, and the same is hereby, reversed with costs, and that the said complainant, George Smith, recover against the said defendant, John J. Orton, seventy-two dollars and sixty-three cents for his costs herein expended, and have execution therefor. And it is further ordered that this cause be, and the same is hereby, remanded to the said district court for further proceedings to be had therein, in conformity to the opinion of this court, and as to law and justice shall appertain." Whereupon it is considered and ordered by this court that execution be issued against the defendant, John J. Orton, for the said sum of seventy-two dollars and sixty-three cents, for costs, as aforesaid; and that this cause be further proceeded with in this court in conformity to the opinion of the said Supreme Court, and as to law and justice shall appertain.

And it is further ordered by the court that the defendant file his
29 answer to the complainant's bill of complaint by the first Monday of November next, or the said bill will be taken as confessed.

Answer.

November 9, 1859.—This day came the defendant, by his solicitor, and filed his answer to the bill of complaint herein, as follows:

District court of the United States for the district of Wisconsin.—In equity.

The answer of John J. Orton, defendant, to the bill of George Smith, complainant.

This defendant, saving and reserving unto himself all manner of benefit and advantage of exception to the errors and insufficiencies of the complainant's bill, for answer thereto, or to so much as he is advised as is material and necessary to be answered unto, says: That he admits that the said Cyrus D. Davis, on the 14th day of July, in the year 1848, was seized in fee of lots number seven and eight, in section No. nine of township No. seven north, of range No. twenty-two east, except three acres, conveyed to Berg. But he denies that said Davis held the said premises subject to any valid trust in favor of Otis Hubbard, and charges that if said Davis held the title of said premises in any manner for the benefit of said Hubbard, he so held for the purpose of concealing said premises from the creditors of said Hubbard, and to cheat and defraud such creditors.

This defendant, further answering, says, that he is informed and believes that said Hubbard owned lots Nos. five and six, in block forty-three, in the second ward of the city of Milwaukee, the title to which was in some relations in the State of New York and Massachusetts, and that said Hubbard sold the same to said Schram, but he denies that he sold said premises at the request of said Butler, or that he trusted the management of such sale with said Butler; and he further denies, on information and belief, that said Butler had anything
30 to do with such sale, and the procurement of sureties therefor, except to attend to the execution of the papers.

This defendant further admits that the said Davis executed a deed of said premises to said Knab, and delivered the same to said Butler, by the direction of said Hubbard, but denies that said Davis delivered said deed to said Hubbard.

This defendant further answering, admits that said Butler afterwards delivered said deed, so executed by said Davis, to said Knab, as security to indemnify said Knab for becoming surety with said Butler for the execution and delivery of the deed to said Schram of said lots five and six, in block forty-three, and

thereupon the said Knab and said Butler executed and delivered their said bond to said Schram, and at the same time said Knab executed and delivered to said Butler his own bond, substantially as set forth in the said complaint.

And the said defendant further answering, shows that he is informed and believes, and charges the fact to be, that the said Knab, at the time he executed the said bond for a deed to said Butler, well knew the contents thereof, and understood the effect and meaning thereof, and that said bond run to said Butler, and was conditioned for the conveyance of said lots, seven and eight, by him to said Butler, upon the performance of the conditions of the said bond which he had executed as surety for said Butler to said Schram; and the said Knab then and there duly acknowledged said bond before a notary, and delivered the same to said Butler.

And this *deponent* further answering, shows, upon like information and belief, that, previously to such execution and delivery of said bond by said Knab to said Butler, said Butler had purchased of and paid said Hubbard for said lots seven and eight, and that it was understood and agreed by and between Butler,
Hubbard, and Knab, that said Knab should execute and deliver a bond
31 to said Butler, conditioned for a conveyance to him of said lots seven and eight.

And this defendant further answering, shows that he cannot, of his own knowledge, state who procured the conveyances from the said persons holding the title of lots five and six, in block forty-three, but that he is informed and believes that said Butler procured such conveyances from their owners, residing in the State of New York, and said Hubbard the remainder; and that this deponent has removed a part of the incumbrances and indemnified the said Schram against the remainder.

This defendant further answering, shows that, on or about the 22d day of February, 1851, he purchased said bond, so executed by said Knab to said Butler, for the sum of twenty-one hundred dollars, which he paid to the said Butler at or about the date of such purchase, except a portion thereof, which was expended in complying with the conditions of the said bond to Schram, and that he caused said bond and assignment to be recorded. That at the time of such purchase the title of record to said lots was in said Knab, free and unencumbered; that this defendant did not know that said Otis Hubbard had, or claimed to have, any right or interest therein whatsoever; that after he purchased said bond he satisfied some of the incumbrances upon said lots five and six, in block forty-three, and indemnified said Schram against the remainder, and procured from him an assignment of the said bond of Butler and Knab, and tendered the same to said Knab, and demanded of him that he execute a conveyance of said premises pursuant to the conditions of his bond to said Butler, so aforesaid assigned to this defendant, which the said Knab then and there refused to execute; whereupon this defendant impleaded the said Knab in the circuit court for Milwaukee county, a court of chancery jurisdiction, in a suit for the specific
performance of the conditions of said bond, a copy of the record and pro-
32 ceedings of which suit is hereunto annexed, marked "A," and which the defendant prays may be taken as a part of his answer to this bill.

This defendant further answering, says that he admits that said Knab refused to execute such deed, as required by said decree, and that, in default, the said Henry L. Palmer, in the name and behalf of said Knab, executed and delivered unto this defendant a good and sufficient deed of said lots, seven and eight. And this defendant claims that, by the purchase of said bond of said Butler, and by the payment of the purchase money without notice, actual or constructive, of any claim, trust, or interest of the said Hubbard, and by the proceedings in said suit, and by the said deed, so as aforesaid executed and delivered by the said Henry L. Palmer, esq., commissioner, in the name and in behalf of said Knab, he was and is a bona fide purchaser of said lots seven and eight for a valuable con-

sideration, without notice, and he claims the benefits and privileges of such purchaser.

This defendant further answering, denies that Otis Hubbard had, on the 7th day of June, 1851, any interest or estate in said premises whatsoever, and insists and charges that whatsoever interest said Hubbard had ever had therein he had sold to said Butler, at or about the date of the conveyance of Davis to Knab, hereinbefore mentioned.

This defendant further answering, denies that said Otis Hubbard, on said seventh day of June, 1851, had any interest in said premises which he could convey.

This defendant further answering, admits that the said Otis Hubbard impleaded this defendant and the said Butler and Knab in a suit in the circuit court of Milwaukee county, a copy of the record and proceedings in which cause is hereunto annexed, marked "B," which this defendant prays may be
33 taken as a part of this answer.

And this defendant further answering, shows that he is informed and believes that the said Hubbard executed a conveyance of said premises to Gruenhagen; that subsequently Gruenhagan executed a conveyance to Brown, and that Brown executed a conveyance to the complainant, at or about the time in said bill set forth.

This defendant further answering, shows that he has been informed and believes, and charges the fact to be, that the said complainant has no beneficial interest in the said premises or in the event of this suit, and that he claims none; that at the time of the execution of the said deed to him by said Brown, said complainant was a resident of the city of Chicago, in the State of Illinois; that he knew nothing of the execution of said deed; that he never negotiated with any person for the purchase of said premises; that he never paid anything therefor; that said conveyance, executed and delivered to said Brown by said Gruenhagen, was made and executed for the benefit of the said James S. Brown, Thomas L. Ogden, and Alexander Mitchell, and that said conveyance by said Brown to said complainant Smith was made for the purpose of placing the title to whatever interest the said Hubbard might have in a non-resident, so as to enable the real parties in interest to litigate the matter in this court, and in fraud of the jurisdiction of this court.

This defendant further answering, admits that at the time he purchased said bond that he was an attorney-at-law.

J. J. ORTON.

E. MARINER,
Solicitor, and of Counsel for Defendant.

34 DISTRICT OF WISCONSIN, *ss:*

On this 7th day of November, 1859, before me came the said John J. Orton, and made oath that he had read the above answer by him subscribed, and that he knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

J. M. MILLER, *Clerk, &c.*

Exceptions to answer.

December 3, 1859.—This day came the complainant, by his solicitor, and filed exceptions to the answer of the defendant, as follows:

District court of the United States for the district of Wisconsin.—In chancery.

GEORGE SMITH
vs.
JOHN J. ORTON.

Exceptions made by George Smith, complainant, to the answer of John J. Orton, defendant.

First exception. For that the following allegations in the last part of the said answer, to wit:

"This defendant further answering, shows that he has been informed and believes, and charges the fact to be, that the said complainant has no beneficial interest in the said premises, or in the event of this suit, and that he claims none; that at the time of the execution of the said deed to him by said Brown, said complainant was a resident of the city of Chicago, in the State of Illinois; that he knew nothing of the execution of the said deed; that he never negotiated with any person for the purchase of said premises; that he never paid anything therefor; that said conveyance, executed and delivered to said Brown by
35 said Gruenhagen, was made and executed for the benefit of the said James S Brown, Thomas L. Ogden, and Alexander Mitchell; and that said conveyance by said Brown to said complainant Smith was made for the purpose of placing the title to whatever interest the said Hubbard might have in a non-resident, so as to enable the real parties in interest to litigate the matter in this court, and in fraud of the jurisdiction of this court"—

Are impertinent and ought to be expunged.

Second exception. For that the allegation on the last page, (on the same page to which the signature of counsel is attached,) as follows, to wit:

"That said conveyance, executed and delivered to said Brown by said Gruenhagen, was made and executed for the benefit of the said James S. Brown, Thomas L. Ogden, and Alexander Mitchell,"

Is impertinent and ought to be expunged.

Third exception. For that the allegation on the same page, last aforesaid, as follows, to wit:

"And that said conveyance by said Brown to said complainant Smith was made for the purpose of placing the title to whatever interest the said Hubbard might have in a non-resident, so as to enable the real parties in interest to litigate the matter in this court, and in fraud of the jurisdiction of this court,"

Is impertinent and ought to be expunged.

THOMAS L. OGDEN,
Sol. for Compl't.

JAMES S. BROWN, *of Counsel.*

36 *Leave to file replication.*

December 5, 1859.—This day came the complainant, by his counsel, and, on his motion, it is ordered by the court that the complainant may now file a replication to the defendant's answer, without prejudice to his exceptions to said answer.

And same day came the complainant, by his solicitors, and filed his replication to said answer, as follows:

Replication.

District court of the United States for the district of Wisconsin.—In chancery.

The replication of George Smith, complainant, to the answer of John J. Orton, defendant, to the bill of complaint of the above complainant.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say: That they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill he has already prayed.

BROWN & OGDEN,
Sol. Compl't.

Part of answer expunged.

January 3, 1859.—This day came the parties, by their counsel, and
37 the exceptions of the complainant to the answer of the defendant having been submitted, on consideration whereof, it is ordered by the court that all that part of the said answer, to wit:

"This defendant further answering, shows that he has been informed and believes, and charges the fact to be, that the said complainant has no beneficial interest in the said premises, or in the event of this suit, and that he claims none; that at the time of the execution of the said deed to him by said Brown, said complainant was a resident of the city of Chicago, in the State of Illinois; that he knew nothing of the execution of said deed; that he never negotiated with any person for the purchase of said premises; that he never paid anything therefor; that said conveyance, executed and delivered to said Brown by said Gruenhagen, was made and executed for the benefit of the said James S. Brown, Thomas L. Ogden, and Alexander Mitchell, and that said conveyance by said Brown to said complainant Smith was made for the purpose of placing the title to whatever interest the said Hubbard might have in a non-resident, so as to enable the real parties in interest to litigate the matter in this court, and in fraud of the jurisdiction of this court"—

Be, and hereby is, expunged for impertinence, so far as it relates to the jurisdiction of this court.

April 13, 1860.—This day came the parties, by their counsel, and, by consent, it is ordered by the court that the time for taking proofs be, and hereby is, extended to both parties to the first Monday of June next.

38 June 8, 1860.—This day came the parties, by their solicitors, and filed their stipulation as to testimony, as follows:

Stipulation as to testimony.

District court of U. S., district of Wisconsin.—In equity.

GEORGE SMITH
vs.
JOHN J. ORTON.

It is hereby stipulated, by and between the parties to this suit, that the evidence taken in a former suit in this court between the same parties, involving

the same subject-matter, may, at the hearing, be read in evidence with the same effect as if the same had been taken in this suit; nothing herein to be construed as preventing either party from taking further testimony.

E. MARINER, *for Defendant.*
BROWN & OGDEN, *for Plaintiff.*

October 1, 1862.—Transferred to circuit court U. S., according to act of Congress approved July 15, 1863.

In the circuit court the following proceedings were had, to wit:

GEORGE SMITH
vs.
JOHN J. ORTON.

October 1, 1862.—Transferred and continued from the district court of the U. S., chancery docket E, page 54.

June 24, 1863.—This day came the defendant, by his counsel, and moved the court to amend his answer, according to the proposed amendment,
39 herein filed. Which proposed amendment is as follows:

Proposed amendment to answer.

Circuit court of the United States for the district of Wisconsin.

GEORGE SMITH
vs.
JOHN J. ORTON.

And now comes the said defendant, by E. Mariner, his solicitor, and leave of court thereunto having been first had and obtained, amends his answer as follows, to wit: After the 10th line, on the 2d page, insert the following allegation:

First. This defendant further answering, admits that at the time of the execution and delivery of said bond by said Knab to said Butler, that said Hubbard was, and for some time had been, a man of intemperate habits, but he denies that such habits had materially injured his mind or capacity for doing business; and this defendant charges the fact to be, that at the time of the execution and delivery of said bonds and said deed of Davis to Knab, that said Hubbard was vastly the superior of said Butler in every respect; that said Butler was, to a very great degree, under the influence and control of said Hubbard.

Second. After the word answer, in the 26th line of page 5th of said answer, insert the following allegation:

This defendant further answering, shows that after said suits, so commenced by said Hubbard against this defendant and said Butler and Knab, and by this defendant against said Knab, had been put at issue, no further proceedings were had of consequence therein, until after the execution and delivery of the said several deeds by said Gruenhagen, Davis, Brown, Lapham, and Knab to
40 the said complainant. That after the execution and delivery of said several deeds, the said James S. Brown, either upon the retainer of the said complainant or upon his own motion, and because the said conveyances were merely made to said complainant as a trustee for said James S. Brown, procured his firm to be substituted as solicitors for the complainant Hubbard, in the first cause, and the defendant Knab, in the second, and thereupon, under such retainer, or upon his own account, conducted and carried on the prosecution and defence of said actions, respectively, until the final decree was rendered in each of said causes. And this defendant insists that the said complainant,

both by reason of his privity in estate with said Hubbard and said Knab, and by reason of his actually having carried on such prosecution and defence, is, and of right ought to be, barred and estopped from having or claiming any interest of, in, and to said premises, by the proceedings and decrees in said causes, and in each of them.

E. MARINER, *Def't's Solicitor.*

DISTRICT OF WISCONSIN, *ss:*

This 16th day of June, 1863, before me came John J. Orton, and made oath that the foregoing amendments were true of his own knowledge, except as to those things therein stated as upon information and belief, and as to those he believed them true.

EDWARD KURTZ,
U. S. Com., Dist. Wis. [STAMP.]

Amendment disallowed.

And the same being objected to by complainant's counsel, it is ordered by the court that the said amendment be disallowed.

41 August 3, 1863.—"On motion of Thomas L. Ogden, sol. for comp't, ordered that this cause be set down for hearing on bill, answer, replication, and proofs on the first Monday of September, A. D. 1863."

Hearing.

September 8, 1863.—This day this cause came on to be heard, Mr. Brown appearing for complainant, and Mr. Mariner for defendant, (said defendant's counsel objected to the hearing on the alleged ground that the cause had not been set down for hearing according to the rules of court;) and, the said hearing not being concluded, the further hearing was adjourned until Saturday, the twelfth instant, at ten o'clock in the forenoon.

September 14, 1863.—This day came the parties by their counsel, and the further hearing of this cause was resumed, and, not being concluded, the further hearing was adjourned by consent until Saturday, the nineteenth day of this month, at nine o'clock in the forenoon.

September 21, 1863.—This day came the parties by their counsel, and by consent the hearing of this cause was resumed, and, not being concluded, the further hearing was adjourned until Friday, the twenty-fifth day of this month, at nine o'clock a. m.

September 25, 1863.—This day came the parties by their counsel, and the hearing of this cause was resumed, and, not being concluded, the further hearing was adjourned until nine o'clock to-morrow morning.

42 September 26, 1863.—This day came the parties by their counsel, and the further hearing of this cause was resumed, and, being concluded, the court took the same under advisement.

And at the said hearing the following testimony and exhibits were read on the part of the complainant:

Complainant's testimony.

Deed of Gruenhagen, &c., to J. S. Brown.

Joachim F. Gruenhagen and wife to James S. Brown.—Deed.

This indenture, made the seventh day of December, in the year of our Lord one thousand eight hundred and fifty-two, between Joachim F. Gruenhagen, of the county of Milwaukee, and State of Wisconsin, and Caroline his wife, parties of the first part, and James S. Brown, of the city of Milwaukee, in the said county and State, party of the second part, witnesseth: That the said parties of the first part, in consideration of the sum of fourteen thousand dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever, all those certain pieces, parcels, or lots of land, situate, lying, and being in the county of Milwaukee, and State of Wisconsin, known and described as follows, to wit: Those certain pieces of land in the northwest quarter of section eight (8), in township seven (7), of range twenty-two (22), described as follows, that is to say, that certain piece bounded as follows: commencing at the
43 southeast corner of the said quarter section; running thence north on the quarter-section line twenty-eight (28) chains and fifty-seven (57) links; thence west, at right angles to said quarter-section line, seventeen (17) chains and fifty-four (54) links, to the centre of the Green Bay road; thence southeasterly, along the centre of the said road, to the south line of the said quarter section; thence east, on the said south line, four (4) chains and sixty-eight links to the place of beginning, containing thirty-one (31) and seventy-four hundredths ($\frac{74}{100}$) acres, more or less. Also, that certain other piece, in the said quarter section, bounded as follows: commencing at a point eight (8) chains and ninety-eight (98) links due east from a point on the west line of the said quarter section sixteen (16) chains and thirty-three (33) links south of the northwest corner thereof, and running thence due east fifteen (15) chains and sixty-one (61) links, to the centre of the said Green Bay road; thence southeasterly, along the centre of the said road, twelve (12) chains and twenty-two (22) links to a point; thence west twenty (20) chains and sixty-four (64) links to a point; and thence north eleven (11) chains and fourteen (14) links to the place of beginning, containing twenty and twenty-eight hundredths ($20\frac{28}{100}$) acres, more or less. And also that certain other piece of land, in the said quarter section, bounded as follows: commencing on the west line thereof, at a point nine (9) chains and thirty-nine (39) links south of the northwest corner thereof; running thence south, on the said line, forty-six (46) links; thence east twenty-one (21) chains and sixty-six (66) links to the centre of the said Green Bay road; thence northwest-
44 erly, along the centre of the said road, fifty links; and thence west twenty-one (21) chains and forty-six (46) links to the place of beginning, containing one acre, more or less. Also, a certain other piece of land, known and described as one acre, more or less, from the northeast corner of the east half of the southwest quarter of section eight (8), in township seven (7), of range twenty-two (22), being on the east side of the said Green Bay road, and between the said Green Bay road and the Washington road, according to the records of the said road, together with the buildings and improvements thereon. Also, those certain other pieces of land, in the southeast quarter of section eight (8), in township seven (7), of range twenty-two (22), described as follows, that is to say: the north fifteen (15) acres of the west half of the said southeast quarter of section eight (8), being a strip of land thirty (30) rods in width, north and south, taken from the north of the said west half of the southeast quarter, and

also the east half of the said southeast quarter of section eight (8), containing eighty (80) acres. Also all the west half of the southwest quarter of section nine (9), in township seven (7), of range twenty-two (22), with the exception of a piece in the southeast corner of the said west half of the southwest quarter, containing fourteen (14) acres, conveyed by the said parties of the first part to one Carl Maas, the said piece being in a rectangular form, and being fourteen (14) chains in length, north and south, and ten (10) chains in width, east and west, the piece hereby conveyed containing sixty-six (66) acres, more or less. Also,

45 all the following described pieces, parcels, or lots of land, situate, lying, and being in the second ward of the city of Milwaukee, to wit: the north one-half of lot four (4), in block forty-one (41); all of lot ten (10), in block forty-one (41); all of lot two (2), in block fifty-one (51), and lot twenty-one (21), in block one hundred and nineteen (119); and the east half of lot two (2), in block forty-seven (47). Also, the east three and one-half (3½) acres of lot number two (2), as designated by decree in partition, in the southeast quarter of section nineteen (19), in township seven (7), of range twenty-two (22). And also all the right, title, and interest of the said parties of the first part, in law and equity, in and to all the lands, lots, and tenements, belonging to or vested in the said parties of the first part, in the county of Milwaukee, or in which the said parties of the first part claim any interest; together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim or demand whatsoever of the said parties of the first part, either in law or equity, of, in, and to the above bargained premises, with their hereditaments and appurtenances: To have and to hold the said premises, as above described, with the hereditaments and appurtenances, unto the said party of the second part, and to his heirs and assigns forever. And the said Joachim F. Gruenhagen, one of the said parties of the first part, for himself and for his heirs, executors, or administrators, does covenant, grant, bargain, and agree to and with the said party of the second part, and to his heirs and assigns, that the above bargained premises in the quiet and peaceful possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to

46 claim the whole or any part thereof, will forever warrant and defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

JOACHIM F. GRUENHAGEN. [SEAL.]
CAROLINE GRUENHAGEN. [SEAL.]

Signed, sealed, and delivered in presence of—

"The south one-half" being erased in the line numbered 44th, and the word "all" being written on the erasure before execution and delivery—

DAVID B. OGDEN,
EUGENE S. FENNER.

STATE OF WISCONSIN,
County of Milwaukee, ss:

Be it known, that on the 8th day of December, A. D. 1852, before me, a notary public in and for said county, personally came the above-named Joachim F. Gruenhagen and Caroline his wife, and acknowledged the above indenture to be their free act and deed, for the uses and purposes therein expressed, and desired the same might be recorded as such according to law.

DAVID B. OGDEN,
Not. Pub., resid. in Mil. C'ty.

Recorded December 28th, A. D. 1852, at 5¼ o'clock p. m.

STATE OF WISCONSIN,
Milwaukee County, Register's Office:

I hereby certify that the foregoing is a true and correct transcript from the records in my office of the foregoing instrument, recorded in volume 37 of deeds, pages 290, 291, 292, and has been by me carefully compared with said records, and that it is the whole thereof.

In testimony whereof, I have hereunto set my hand this 22d day of September, A. D. 1863.

[STAMP.]

F. BAGGELER,
Register, Mil. Co., Wis.

47 *Bond of Gruenhagen to Otis Hubbard.*

Know all men, that I, Joachim F. Gruenhagen, am held and firmly bound unto Otis Hubbard in the sum of two thousand dollars, to be paid to the said Otis Hubbard, his heirs or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, dated this seventh day of June, A. D. 1851.

The condition of this obligation is such, that whereas the said Otis Hubbard has this day conveyed, by quit-claim deed, to the said Joachim F. Gruenhagen, lots seven and eight, of section nine, town. seven, and range twenty-two, in the town and county of Milwaukee and State of Wisconsin, containing seventy-four $\frac{47}{100}$ acres: Now, therefore, if the said Gruenhagen, his heirs or assigns, shall pay, or cause to be paid, to the said Hubbard, the sum twelve hundred dollars, whenever the said Hubbard shall redeem the said tract of land above described from all liens and incumbrances now existing thereon and against the same, then this obligation to be void, otherwise in force.

JOACHIM F. GRUENHAGEN. [SEAL.]

In presence of—
CHAS. E. JENKINS.

(Endorsed as follows:)

Received of James S. Brown one hundred and fifty dollars, in full satisfaction of this bond, the said Brown to clear, at his own expense, the land therein referred to from all incumbrances.

J. A. LAPHAM,
Adm'r of est. of O. Hubbard.

MILWAUKEE, *Jan'y* 14, '52.

Mortgage accompanying said bond.

Mortgage of Gruenhagen to Otis Hubbard.

48 Know all men, that Joachim F. Gruenhagen, party of the first part, in consideration of a quit-claim deed of the property hereinafter described, and of the sum of one dollar to him in hand paid by Otis Hubbard, party of the second part, the receipt whereof is hereby acknowledged, does hereby bargain, sell, and convey to the said party of the second part, heirs and assigns, forever, the following real estate, viz: lots seven (7) and eight (8), of section nine (9), town. seven (7), and range twenty-two (22), in the town and county of Milwaukee and State of Wisconsin, containing seventy-four $\frac{47}{100}$ acres ($74\frac{47}{100}$ acres), together with all the privileges and appurtenances to the same belonging; to have and to hold the same to the said party of the second part, his heirs and assigns, forever: Provided, always, and these present are upon this express condition, that if the said party of the firs part, his heirs, executors, administrators, shall pay, or cause to be paid, to the said party of the second part, his heirs, executors, administrators, or assigns, the sum of twelve hundred dollars, at the time and in the manner mentioned, and according to the condition

of a certain bond, bearing even date herewith, executed by the said party of the first part to the said party of the second part, and shall also pay annually to the proper officers all taxes which shall be assessed thereon, then these presents shall be null and void; but in case of the non-payment of any sum of money, (either of principal, interest, or taxes,) at the time or times when the same shall become due, agreeably to the conditions of these presents, or of the aforesaid bond, or any part thereof, then, in such case, the whole sum of all the payments therein or herein stipulated to be paid on any day or any time shall be deemed to have become due, and the same shall thereupon be collectable in a
49 suit at law, or by foreclosure of this mortgage, in the same manner as if the whole of said sums had been made payable at the time when any such failure in any payment shall occur, as aforesaid; and it shall be lawful in such case for said party of the second part, his heirs, executors, administrators, or assigns, and the said party of the first part does hereby empower and authorize the said party of the second part, his heirs, executors, administrators, or assigns, to grant, sell, and convey the said real estate, with the appurtenances thereunto belonging, at public auction or vendue, and on such sale to make and execute to the purchaser or purchasers, his, her, or their assigns forever, good and sufficient deeds of conveyance in the law, pursuant to the statute in such case made and provided.

In witness whereof, the said party of the first part has hereunto set his hand and seal this seventh day of June, in the year eighteen hundred and fifty-one.

JOACHIM F. GRUENHAGEN. [SEAL.]

Signed, sealed, and delivered in presence of—
P. POWELL.
CHAS. E. JENKINS.

STATE OF WISCONSIN,
Milwaukee County, ss:

On this 7th day of June, A. D. one thousand eight hundred and fifty-one, before me, the subscriber, a notary public in and for said county, personally came Joachim F. Gruenhagen, the grantor in the above conveyance, and acknowledged the same to be his voluntary act and deed, for the uses and purposes therein mentioned.

CHAS. E. JENKINS,
Notary Public, Milw. Co.

(Which mortgage is endorsed as follows:)

50 I do hereby certify that the within mortgage, executed by Joachim F. Gruenhagen to Otis Hubbard, dated June 7th, 1851, is satisfied and discharged.

Witness my hand and seal this 14th day of January, A. D. 1853.

J. A. LAPHAM, [SEAL.]
Administrator of the estate of Otis Hubbard.

In presence of—
DAVID B. OGDEN.
JOHN DALE.

STATE OF WISCONSIN,
Milwaukee County, ss:

On this 14th day of January, A. D. 1853, personally appeared before me the above named J. A. Lapham, administrator of the estate of Otis Hubbard, deceased, and acknowledged that he executed the above release freely and voluntarily.

DAVID B. OGDEN,
Not. Pub. resid. in Mil. C'ty.

Mortgage of Gruenhagen to Lewis F. Hubbard.

Joachim F. Gruenhagen to Lewis F. Hubbard.—Mortgage.

Know all men, that Joachim F. Gruenhagen, of Milwaukee, Wisconsin, party of the first part, in consideration of a deed for the property hereinafter described, and of the sum of one dollar to him in hand paid by Lewis F. Hubbard, of Rochester, New York, party of the second part, the receipt whereof is hereby acknowledged, does hereby bargain, sell, and convey to the said party of the second part, his heirs and assigns, forever, the following real estate, viz: lot No. four, in block No. forty-one, in the second ward of the city of Milwaukee, on the west side of the river, in the county of Milwaukee and Territory of Wisconsin, together with all the privileges and appurtenances to the same be-
51 longing; to have and to hold the same to the said party of the second part, his heirs and assigns, forever; hereby covenanting that the title so conveyed is clear, free, and unincumbered, and that the said party of the first part will warrant and defend the same against all claims whatsoever: Provided, always, and these presents are upon this express condition, that if the said party of the first part, his heirs, executors, or administrators, shall pay, or cause to be paid, to the said party of the second part, his heirs, executors, administrators, or assigns, the sum of seven hundred dollars, according to the condition of three notes, bearing even date herewith, executed by the said party of the first part to the said party of the second part, and shall, moreover, pay interest thereon annually, at the rate of ten per cent. per annum, to the said party of the second part, upon the aggregate sum therein, or herein stipulated to be paid, and shall also pay annually to the proper officers all taxes which shall be assessed thereon, then these presents shall be null and void; but in case of the non-payment of any sum of money (either of principal, interest, or taxes) at the time or times when the same shall become due, agreeably to the condition of these presents, or of the aforesaid notes, or any part thereof, then, in such case, the whole sum of all the payments therein or herein stipulated to be paid on any day or any time shall be deemed to have become due, and the same shall thereupon be collectable in a suit at law, or by foreclosure of this mortgage, in the same manner as if the whole of said sums had been made payable at the time when any such failure in any payment shall occur, as aforesaid; and it shall be lawful, in such
52 case, for said party of the second part, his heirs, executors, administrators, or assigns, and the said party of the first part does hereby empower and authorize the said party of the second part, his heirs, executors, administrators, or assigns, to grant, sell, and convey the said real estate, with the appurtenances thereunto belonging, at public auction or vendue, and, on such sale, to make and execute to the purchaser or purchasers, his, her, or their heirs or assigns forever, good and sufficient deeds of conveyance in the law, pursuant to the statute in such case made and provided.

In witness whereof, the said party of the first part has hereunto set his hand and seal, this twenty-second day of May, in the year eighteen hundred and forty-seven.

JOACHIM F. GRUENHAGEN. [SEAL.]

Signed, sealed, and delivered in presence of—
WILLIAM BURKE.
CHAS. E. JENKINS.

TERRITORY OF WISCONSIN,
Milwaukee County, ss:

On this twenty-second day of May, A. D. one thousand eight hundred and forty-seven, before me, the subscriber, a notary public in and for said county,

personally came Joachim F. Gruenhagen, the grantor in the above conveyance, and acknowledged the same to be his voluntary act and deed, for the uses and purposes therein mentioned.

CHAS. E. JENKINS,
Notary Public.

Endorsed: Received for record May 24th, A. D. 1847, at 4¼ o'clock p. m. and recorded in vol. G of mortgages, pages 550 and 551.

WM. S. WELLS,
Reg. Mil. Co.

53 And in pursuance of the stipulation of the parties filed, June 8th, 1860, the following evidence, taken in a former suit in this court, between the same parties, involving the same subject-matter, was read at the hearing of this cause and filed herein, as follows:

Commission.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

[SEAL.] The President of the United States of America, to Francis Randall, greeting:

Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority, to examine David Knab, Joseph Schram, and Cyrus D. Davis on their corporal oaths, as witnesses in a cause depending in the district court of the United States for the district of Wisconsin, wherein George Smith is complainant, and John J. Orton is defendant, on the part of the complainant, upon the interrogatories annexed to this commission, and therefore you are
54 hereby commanded that you, at certain days and places to be appointed by you for that purpose, do cause the said David Knab, Joseph Schram, and Cyrus D. Davis to come before you, and then and there examine them on oath upon the said interrogatories, and that you take such examination and reduce the same into writing, and return the same, annexed to this writ, closed up under your seal, into the said district court of the United States, before the judge thereof, with all convenient speed.

Witness the Honorable Andrew G. Miller, judge of the district court of the United States of America for the district of Wisconsin aforesaid, at Milwaukie, in said district, this 21st day of December, A. D. 1853, and of the independence of the United States the seventy-eighth.

B. K. MILLER, *Clerk.*

Rules annexed to Commission.

Rules.

"On the receipt of the commission made out as aforesaid, by any one of the commissioners named, he shall give notice to the other commissioners named therein of the time and place of taking the depositions, if possible; and if any of the commissioners are absent at the execution of said commission, any one or more present may proceed to execute the same, (unless otherwise expressly directed therein,) as if all were present; but they must certify that those absent have been duly served with notice of the time and place of executing said commission, or the reasons for their not being so notified."

The persons to whom such commission shall be directed, or any one or more of them, unless otherwise expressly directed therein, shall execute the same as follows :

First. They, or any of them, shall publicly administer an oath to the witnesses named in the commission, that the answers given by such witnesses to the interrogatories proposed to them shall be the truth, the whole truth, and nothing but the truth.

Second. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him, and certified by such of the commissioners as are present at the taking of the same.

Third. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall, in like manner, be subscribed by the witness proving the same. (This section must be understood to refer to such papers as can be produced upon the examination.) If the paper referred to be a record not subject to the control of the party or the commissioners, it will be sufficient to annex a copy, and the original may be produced on the trial separate from the commission.

Fourth. The commissioner or commissioners shall subscribe each
55 sheet of the depositions, and annex all the depositions and exhibits to the commission, upon which the return shall be indorsed, and shall close them up under their or his seals, and shall address the same, when so closed, to the clerk of the court from which the commission issued, at his place of residence, with the style of the suit.

Fifth. If there is or is not a direction on the commission to return the same by mail, they, or he, shall immediately deposit the packet so directed in the nearest post office.

Sixth. If there be a direction on the commission, to return the same by an agent of the party who sued out the same, the packet so directed shall be delivered to said agent.

District court of the United States for the district of Wisconsin.

GEORGE SMITH
vs.
JOHN J. ORTON. } In chancery.

Interrogatories to be propounded to David Knab, a witness to be produced, sworn and examined before Francis Randall, a commissioner in the above entitled cause, in behalf of the complainant:

First interrogatory. Are you acquainted with the parties, plaintiff or defendant, in this suit ?

2d interrogatory. Did you ever receive a deed of lots No. seven and eight, section No. nine, of township No. seven north, of range No. twenty-two east? If so, from whom did you receive such deed, who was grantor, and for what purpose ?

3d interrogatory. Did you pay anything, and if so, what, and how, for said land ? Please state all the particulars in regard to the giving of the deed.

4th interrogatory. If you shall have stated, in answer to a former interrogatory, that you received a deed of said land as security, please state for what.

5th interrogatory. Did you ever sign a bond with Tertullus D. Butler to Joseph Schram, for the conveyance of certain lots in the city of Milwaukie ? Please state who first requested you to sign such bond ; whose property the lots in the city of Milwaukie were represented to be, and for whose benefit the sale to Schram was made. Please state all facts in regard to your being induced to sign the bond.

6th interrogatory. Did the said Butler represent to you who was the owner of said lots seven and eight in said section, before or at the time the said deed was given? and if so, whose did he say they were?

7th interrogatory. Did you sign a bond to one Tertullus D. Butler, for the conveyance of said lots No. seven and eight to him, on any conditions? If so, please state what (if anything) he paid you for signing it; whether
56 at the time you signed you knew the contents thereof; whether there was any previous understanding either between you and said Butler, or you and said Hubbard, or said Davis, that such bond should be given; also, when you first discovered that such bond was in existence. Give all the particulars in relation to the matters herein asked.

8th interrogatory. If you shall answer that you signed such bond, please state whether or not you ever delivered it to the said Butler, or to any one else for him.

9th interrogatory. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

BROWN & OGDEN,
Solicitors for Compl't.

Cross-interrogatories to be propounded to the witness, David Knab:

Defendant objects in the second interrogatory to the witness testifying concerning the purpose of the deed, other than appears from the face of the instrument, and to all testimony so far as it goes to set up trust by parol.

Defendant objects to the sixth interrogatory as irrelevant.

1st cross-interrogatory. If you answer to seventh interrogatory that you had a conversation with said Davis, Butler or Hubbard, or either of them, state when, where, and in whose presence, and what was the purport thereof.

2d cross-interrogatory. If you state, in answer to sixth interrogatory, that you signed said bond, did you not sign said bond on receiving a deed of the lots aforesaid from said Butler, or one procured by him and delivered to you?

3d cross-interrogatory. Have you not stated, in an answer in the Milwaukie circuit court, in a chancery suit, that you had no knowledge of whose the lots aforesaid were, but would deed to whomsoever the court would direct? and if so, was such statement true?

E. MARINER,
Sol'r for Defend't.

District court of the United States for the district of Wisconsin.

GEORGE SMITH
vs.
JOHN J. ORTON. } In chancery.

Interrogatories to be propounded to Joseph Schram, a witness to be produced before the commissioner, and sworn and examined in said cause in behalf of the complainant:

57 First interrogatory. Are you acquainted with the parties plaintiff or defendant in this suit?

2d interrogatory. Did you receive any deeds of the lots described, in the bond from Tertullus D. Butler and David Knab to you, not now of record? If so, what?

3d interrogatory. Have you ever surrendered to David Knab or Tertullus D. Butler the bond given by them to you?

4th interrogatory. With whom did you make the contract for the purchase of said lots, and as whose lots did you agree to purchase them? At whose request did you take said bond? State all particulars in regard to it.

5th interrogatory. To whom and for whose benefit did you pay the purchase-money of said lots?

6th interrogatory. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

BROWN & OGDEN,
Sol'rs for Complainant.

Cross-interrogatories to be propounded to the witness, Joseph Schram:

Defendant objects to the 2d, 4th, and 5th interrogatories to said witness as irrelevant, and defendant objects to all testimony so far as the same goes to set up a trust by parol.

1st cross-interrogatory. Did you assign said bond in said interrogatories mentioned to said defendant in writing, on the back of said bond?

2d cross-interrogatory. Did you not receive from said defendant several satisfactions of judgments against Otis Hubbard, procured by said defendant, which said judgments were liens on the lots described in the said bond to you?

E. MARINER,
Sol'r for Def'd't.

District court of the United States for the district of Wisconsin.

GEORGE SMITH
vs.
JOHN J. ORTON. } In chancery.

Interrogatories to be propounded to Cyrus D. Davis, a witness to be produced before the commissioner, and sworn and examined in the above-entitled cause, in behalf of the complainant:

First interrogatory. Are you acquainted with the parties complainant and defendant in this cause?

58 Second interrogatory. Did you ever hold the legal title of lots No. seven and eight, in section No. nine, in township No. seven north, of range twenty-two east, in the county of Milwaukie? (being the same land deeded by you to David Knab.)

Third interrogatory. For whose benefit and use, and as whose property, did you hold said land?

Fourth interrogatory. At whose request did you convey said premises to the said Knab, and was anything paid you therefor; and if so, what? Please to state the particulars.

Fifth interrogatory. From whom did you receive a deed of said premises, and with what was the consideration paid? If in notes, please state who gave the notes, and to whom they were payable.

Sixth interrogatory. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, and the matters in question in this cause? And if yea, set forth the same fully and at large in your answer.

BROWN & OGDEN,
Sol'r for Compl't.

Cross-interrogatories to be propounded to the witness, Cyrus D. Davis:

Defendant objects to the 3d, 4th, and 5th interrogatories as irrelevant, and also so far as it goes to set up trust by parol.

1st cross-interrogatory. If in your answer to the third interrogatory you answer you held said lots of land for the benefit and use of Otis Hubbard, please state how, and in what manner, you held them for said Hubbard; and was such benefit, use, or trust expressed in writing?

2d cross-interrogatory. If you state you held said lands for the benefit of Otis Hubbard, please state whether you did not hold said lands to keep the same from said Hubbard's creditors?

3d cross-interrogatory. Did not said Hubbard request you to make out the deed to said Knab, and deliver the same to said Butler? And did you not deliver said deed to said Butler at the request of said Hubbard?

4th cross-interrogatory. Was not Otis Hubbard in embarrassed circumstances for several years before he died, say from 1845 to time of his death, and did he ever hold real estate in his own name, to your knowledge, for fear of creditors?

E. MARINER,
Sol'r for Def'nt.

Afterwards, to wit, on the 31st day of December, A. D. 1853, the said commission was returned, indorsed as follows: "The execution of the within commission appears by the schedule hereto annexed."

F. RANDALL,
Commissioner.

59 Which said schedules are as follows:

"The testimony of David Knab, Joseph B. Schram, and Cyrus D. Davis, taken by virtue of a commission issued out of the district court of the United States for the district of Wisconsin, in a certain cause pending in said court wherein George Smith is complainant, and John J. Orton is defendant, before me, Francis Randall, commissioner, at my office, in the city of Milwaukie, on the twenty-ninth and thirtieth days of December, one thousand eight hundred and fifty-three.

David Knab, a witness produced, sworn and examined on the part of the complainant, saith:

To the first direct interrogatory he saith: I know the defendant, but not the complainant.

To the second direct interrogatory he saith: I got a deed of the premises mentioned in this interrogatory executed by Cyrus Davis, which was given me by Tertullus D. Butler in June or July, 1848. I had been security for Otis Hubbard for making good the title of certain real estate sold by him to Mr. Schram, and this deed was given to me to secure me against this liability.

To the third direct interrogatory he saith: I never paid anything for the land thus conveyed to me; it was conveyed, as I have stated in my answer to the 2d interrogatory, to indemnify me against my liability as security for O. Hubbard, and I have never paid anything for it.

To the fourth direct interrogatory he saith: I can make no further answer to this interrogatory than I have made in answer to the second and third interrogatories.

In answer to the fifth direct interrogatory he saith: I did sign a bond with Tertullus D. Butler, to Joseph Schram, for the conveyance of certain lots in the city of Milwaukie. Mr. Otis Hubbard requested me to go his security to Mr. Schram, as I have stated. Mr. Butler came for me and took

me to Mr. Hemennay's office, where I signed two bonds, and gave me the deed spoken of. Mr. Hubbard sometimes represented the lots as the property of one person, sometimes of another. The sale to Schram was represented to be for the benefit of said Hubbard. Hubbard said there would be no harm; that it would be all right; that the deed would be here in about three months.

In answer to the sixth interrogatory he saith: That a day or two before the deed was given, the said T. D. Butler told me he had looked up the title to lots seven and eight, and it was all clear; he said the land belonged to Hubbard, but that the deed would come from Davis.

In answer to the seventh direct interrogatory he saith: One of the bonds executed by me in the office of Hemennay was to T. D. Butler, for the conveyance to him of lots 7 and 8. I think there were no conditions to
60 said bond. He paid me nothing for signing said bond. I did not know its contents at the time I signed it; there was no previous understanding between me and Hubbard, Butler or Davis that such bond should be given. I had been requested to go security to Schram, and did not know until I got to Hemennay's office that I was to give any bond at all. I first discovered the existence of this bond in January, 1850, according to my best recollection.

In answer to the eighth interrogatory he saith: I left the bond lying on the table in Hemennay's office. I don't know that I ever had it in my hands, after I signed it, until 1850.

In answer to the ninth direct interrogatory he saith: I do not.

DAVID KNAB.

The witness says he meant, in answer to the fifth interrogatory, to say, that Hubbard represented that he had some property in the hands of one person and some in the hands of others.

DAVID KNAB.

In answer to the first cross-interrogatory the said witness saith: The first conversation I had with Hubbard was at my house, about two or three weeks before I signed the bond spoken of. I don't think there was any one present. Mr. Hubbard asked me if I would be afraid to go security for him for a thousand dollars, if he could secure me well; he talked about this several times, and I finally consented. He wanted me to go security with him to make good the title to some lots in the city of Milwaukie which he was to sell to Schram, the title to which, as I now recollect, was to come from Julia Bates and some others.

In answer to the second cross-interrogatory he saith: I signed the bond mentioned in the sixth direct interrogatory at the time I received the deed from Davis to lots seven and eight, which was given to me for the purpose I have heretofore stated.

In answer to the third cross-interrogatory he saith: I never have so stated—meaning that I did not know where the lots were of my own knowledge, and such statement was true.

In further answer to the first cross-interrogatory he saith: About the time, a few days before I signed the bonds, Mr. Butler came to me in my store (whether others were present or not I don't know,) and asked me if Hubbard had applied to me to go security for him to Schram; he said I had better, that he was also to be security; that I would not be harmed; I would lose nothing by it; that he was worth that much himself; there was a good deal more said which I cannot recollect; I have stated the substance of it.

DAVID KNAB

Joseph Schram being sworn, deponent saith to the first direct interrogatory: I know Mr. Orton, but not Mr. Smith.

To the second direct interrogatory he saith: I did receive from
61 Otis Hubbard a deed of the lots described in the bond from Tertullus D. Butler and David Knab to me. The lots were twenty-five feet in lot five, and ten feet in lot six, in block forty-three, in the second ward of the city of Milwaukie. The deed was executed in part by Hubbard for himself, or in part by him as att'y for others.

In answer to the third direct interrogatory he saith: I never did surrender to Mr. Knab or Mr. Butler the bond given to me by them.

In answer to the fourth direct interrogatory he saith: I made the contract for the lots with Otis Hubbard, who said they belong to some person east, and he could sell them to me. Mr. Butler and Hubbard requested me to take said bond. Desiring to purchase the property, I applied to Otis Hubbard to know if he could sell it; he said he could, but upon examining the record I found it was nothing. He asked me if I would take Mr. Butler's bond for a deed in three months, which I declined; he then proposed Mr. Knab and Mr. Butler's bond, which I acceded to.

In answer to the fifth direct interrogatory he saith: I paid the money in Mr. Butler's room, in presence of Hubbard. Hubbard took some of the money; said to Butler you may take some; that is all I know about it.

In answer to the sixth direct interrogatory he saith: Mr. Orton came to me, and asked me if I had got the title all right to the lots I lived on; I replied, no. He then asked me if I would give up the bond to him, if he would make it right. He then took up or satisfied one or two judgments against Hubbard, and became responsible to me for the satisfaction of another judgment against Hubbard, and I gave him up the bond.

J. B. SCHRAM.

To the first cross-interrogatory the said witness saith: I did assign said bond to said defendant.

To the second cross-interrogatory he saith: I did receive from Mr. Orton satisfaction of two judgments against Otis Hubbard, which I supposed were liens upon said property.

J. B. SCHRAM.

Cyrus D. Davis, being duly sworn, saith, in answer to the first interrogatory: I knew the parties, complainant and defendant.

In answer to the second interrogatory he saith: I think I did.

To the third interrogatory he saith:

In answer to the third interrogatory he saith: I held it for the benefit and use and as the property of Otis Hubbard.

In answer to the fourth interrogatory he saith: I conveyed the said premises to Mr. Knab, at the request of Mr. Hubbard: nothing was paid me for them.

In answer to the fifth interrogatory he saith: I received a deed of said premises from John A. Messenger; the consideration paid for it was
62 in notes executed by said Messenger, which I received from Otis Hubbard, and I think were payable to said Hubbard; I cannot tell certainly.

In answer to the sixth interrogatory he saith: I do not know anything further material to this cause.

CYRUS D. DAVIS.

In answer to the first cross-interrogatory: Mr. Hubbard assigned the notes to me, and requested me to sue and collect them in my name. I have looked for the assignment, but cannot find it; there was no other writing

between us, and I think this was only an assignment of the notes, without expressing the object of the assignment; the land was taken for the notes, by Mr. Hubbard's direction.

In answer to the second cross-interrogatory he saith: I had the impression that Hubbard's purpose was to screen his property from his creditors, although he did not express any such intention to me.

In answer to the third cross-interrogatory he saith: I did make out said deed to Knab and deliver the same to Butler at the request of Hubbard; I think Hubbard was in embarrassed circumstances from 1845 to his death, and was not aware that he held any real estate in his own name.

CYRUS D. DAVIS.

UNITED STATES OF AMERICA,
District Court for the District of Wisconsin.

I, Francis Randall, commissioner named in this commission hereto annexed, do certify, that the witnesses whose testimony is contained in the foregoing sheets, signed by me, appeared before me at my office in the city of Milwaukie, on the twenty-ninth and thirtieth days of December, 1853, in pursuance of a subpœna, and each having first been sworn to testify the truth, the whole truth, and nothing but the truth, testified in the said cause, in said commission described, that the above foregoing is the testimony so delivered by them; that it was reduced to writing by me and in their presence, and that testimony of each witness was signed by said witness in my presence, after having been carefully read over by me.

FRANCIS RANDALL,
Commissioner.

63 *Commission.*

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

[SEAL.] The President of the United States of America to Francis Randall, greeting:

Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority, to examine Tetullus D. Butler, John A. Messinger, Sylvester Pettibone, Cyrus D. Davis, and Franklin Ripley, jr., on their corporal oaths, as witnesses in a cause pending in the district court of the United States for the district of Wisconsin, wherein George Smith is plaintiff, and John J. Orton is defendant, on the part of the defendant, upon interrogatories annexed to this commission, and therefore you are hereby commanded that you, at certain days and places to be appointed by you for that purpose, do cause the said Tetullus D. Butler, John A. Messinger, Sylvester Pettibone, Cyrus D. Davis, and Franklin Ripley, jr., to come before you, and then and there examine them on oath upon the said interrogatories, and that you take such examination, and reduce the same into writing, and return the same, annexed to this writ, closed up under your seal, into the said district court of the United States, before the judge thereof, with all convenient speed.

Witness the honorable Andrew G. Miller, judge of the district court of the United States of America for the district of Wisconsin aforesaid, at Milwaukie, in said district, this 24th day of January, A. D. 1854, and of the independence of the United States the seventy-eighth.

B. K. MILLER, *Clerk.*

64 *Rules annexed to Commission.*

Rule.

On the receipt of the commission, made out as aforesaid, by any one of the commissioners named, he shall give notice to the other commissioners named therein of the time and place of taking the depositions, if possible; and if any of the commissioners are absent at the execution of said commission, any one or more present may proceed to execute the same (unless otherwise expressly directed therein) as if all were present; but they must certify that those absent have been duly served with notice of the time and place of executing said commission, or the reason for their not being so notified.

The persons to whom such commission shall be directed, or any or more of them, unless otherwise expressly directed therein, shall execute the same as follows:

First. They, or any of them, shall publicly administer an oath to the witnesses named in the commission, that the answers given by such witnesses to the interrogatories proposed to them shall be the truth, the whole truth, and nothing but the truth.

Second. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him, and certified by such of the commissioners as are present at the taking of the same.

Third. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall, in like manner, be subscribed by the witness proving the same. (This section must be understood to refer to such papers as can be produced upon the examinati[illegible] the paper referred to be a record not subject to the control of the party [illegible] commissioners, it will be sufficient to annex a copy, and the original ma[illegible]duced on the trial separate from the commission.)

Fourth. The commissioner, or commissioners, shall subscr[illegible]ch sheet of the depositions, and annex all the depositions and exhibits to the commission, upon which the return shall be indorsed, and shall close them up under their or his seals; and shall address the same, when so closed, to the clerk of the court from which the commission issued, at his place of residence, with the style of the suit.

Fifth. If there is or is not a direction on the commission to return the same by mail, they, or he, shall immediately deposit the packet so directed in the nearest post office.

Sixth. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet so directed shall be delivered to said agent.

65 United States district court, district of Wisconsin.

GEORGE SMITH }
vs.
JOHN J. ORTON. }

Interrogatories to be propounded to Tertullus D. Butler, a witness to be sworn and examined on the part of the defendant before Winfield Smith, esq., commissioner, under and by virtue of a commission to be issued out of said court, to contain the direct interrogatories herein contained, and such cross-interrogatories as may be filed within ten days from the filing hereof:

First interrogatory. Do you know the parties to this suit?

Second interrogatory. Did you ever own any title or interest, legal or equitable, in lots seven or eight, in section No. nine north, of range twenty-two east? and if yea, annex to your answer a copy of the instrument under which you claimed.

Third interrogatory. What did you do with that instrument or title?

Fourth interrogatory. If you answer to the last interrogatory that you sold it, state to whom, for what consideration, and whether said consideration was paid to you.

If you answer to the last interrogatory that you sold such title or interest to the defendant, state whether—

Fifth interrogatory. Did you know Otis Hubbard during his lifetime, and how long did you know him?

Sixth interrogatory. What was his condition pecuniarily during the whole of your acquaintance? Had he any property, real or personal, either in his own name or in the name of any other person?

Seventh interrogatory. If you answer to the last interrogatory that he had property, the title to which was held in the name of any other person, state, if you know, from his declarations, or of your own knowledge, why the title to said property was held in the name of such other person, and not in the name of said Hubbard.

Eighth interrogatory. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

JAMES & MARINER,
Defendant's Solicitors.

Cross-interrogatories to be propounded to Tertullus D. Butler, a witness in behalf of the defendant:

66 First cross-interrogatory. Are you the person mentioned in the instrument signed by David Knab, and assigned by Tertullus D. Butler to the defendant Orton?

Second do. Did Otis Hubbard claim to be the owner of a part of lots five and six, mentioned in the bond of Butler and Knab to Schram, and referred to in the instrument first above mentioned; and did you and Knab give the bond to Schram, in fact, as sureties for said Hubbard, as to enable him to sell said premises to Schram?

Third do. Were lots seven and eight, in section nine, in town. No. 7 north, of range 22, conveyed to Knab as security for his liability on the bond to Schram, and to induce him to sign the bond?

Fourth do. Did Otis Hubbard at any time claim to be the owner of lots seven and eight?

Fifth do. If you shall answer that you ever purchased said lots, No. seven and eight, state from whom you purchased, when you purchased, whether before or after the deed from Davis to Knab, and whether you paid any money to Knab for the land.

Sixth do. If you shall answer that you purchased from Otis Hubbard, state whether you received from him anything in writing as evidence of the purchase, and where such writing is; who was present when the bargain between you and said Hubbard was made, and all the particulars of the bargain.

Seventh do. State also how much you paid for the land, and who saw it paid; whether anything was paid in money as a consideration for the purchase.

Eighth do. Have you ever sworn, in a cause between said defendant and Knab, that you purchased your interest of said Hubbard, that no writings passed between you and said Hubbard, that no one was present at the time of the agreement, and that the consideration of the purchase was a past indebtedness from said Hubbard to you for board, groceries, and money loaned, &c., or anything to that effect?

Ninth do. Did you at the same time swear that the indebtedness commenced in 1844 or 1845, and ended in 1850, or anything to that effect, and what?

Tenth do. Will you give the items of the indebtedness, and how it accrued?

Eleventh do. Have you regular account-books in which the charges against said Hubbard were entered? or if lost or destroyed, how long since they were in your possession, and how did they happen to be lost or destroyed?

Twelfth do. Have you any vouchers or notes from Otis Hubbard evidencing his indebtedness to you?

Thirteenth do. In what business were you from 1844 and '45 to 1849? In what business was Otis Hubbard? had he a family, or was he unmarried?

Fourteenth do. Did you receive any portion of money paid by Schram as consideration for parts of lots 5 and 6?

Fifteenth do. Was Otis Hubbard personally present at the time of
67 the execution and delivery of the said bond to Schram, or of the instrument signed by Knab to yourself? Did you act as his agent?

Sixteenth do. Did you disclose to the person drawing up said bond and instrument that Otis Hubbard had any interest either in lots five and six, or in said lots seven and eight, or in any part of the transaction?

Seventeenth do. Did you, as justice of the peace, take the acknowledgment of the deed from Davis to Knab? Did said Hubbard direct Davis to execute the deed? And at whose request did you take the acknowledgment?

Eighteenth do. Was Hubbard present when the deed was acknowledged, and did you take away the deed?

Nineteenth do. Did you ever execute to the defendant any other instrument in regard to said lots seven and eight than the assignment on the back of the bond? If so, where is the instrument?

Twentieth do. For how much did you sell your interest in said instrument to said Orton? How much did he pay, in what manner, at what terms, and in whose presence?

Twenty-first do. Did you have any witness of the bargain between you at the time you executed the assignment? Did said Orton execute to you any writing for the purchase-money, or any part of it, or for any other and what purpose?

Twenty-second do. Did you at any time, at or prior to the execution of said assignment, say anything to said Orton about your purchase from said Hubbard, or disclose to him how you acquired an interest in said lots seven and eight, or did he ask you anything about it, and what account did you give? State minutely.

Twenty-third do. When did you first say to him anything about your purchase from Hubbard?

Twenty-fourth do. Have you been examined as a witness touching these same matters in a case in the circuit court of Milwaukie county, and wherein the said Orton was complainant, and the said Knab defendant? If so, did you give the same account of the transaction as you now give, or did you vary, and in what respect?

Twenty-fifth do. Did you file an answer in said court in a suit wherein said Otis Hubbard was complainant, and yourself, said Orton and Knab, were defendants, touching these same matters, and did you give the same account thereof as you now give?

Twenty-sixth do. Did said Hubbard board with you the whole time from 1846 to 1850? or if not, what part of the time was he absent, and where did he board?

Twenty-seventh do. How much were you worth, over and above your debts, from the year 1845 to the year 1849, and when did you cease to pay your debts, or fail?

Twenty-eighth do. What did you do with the money recovered from said Orton?

Twenty-ninth do. Did you receive a deed of land in Waukesha county
68 belonging in fact to said Hubbard, or held in trust for him, and did you afterwards mortgage the same? If so, what land, how much was it worth, and in whom is the title now vested, and by what means?

BROWN & OGDEN,
Sol'rs for Complain't.

District court of the United States, district of Wisconsin.

GEORGE SMITH
vs.
JOHN J. ORTON. } In chancery.

Interrogatories to be propounded to John A. Messinger and Sylvester Pettibone, witnesses to be produced, sworn and examined on the part of the defendants before Winfield Smith, esq., commissioner of said court, under and by virtue of a commission to be issued out of said court, containing the direct interrogatories herein contained, and such cross-interrogatories as may be filed within ten days from the filing hereof:

First. Did you know the late Otis Hubbard, and how long, and where did he reside?

Second. What was his situation pecuniarily?

Third. Did you know of his owning or claiming to own any property either in his own name or in the name of any other person, and what are your means of knowing?

Fourth. If you answer to the last interrogatory that you knew of said Hubbard's claiming to own property, the title of which was in the name of some other person, state whether said Hubbard exercised acts of ownership on the same, selling or leasing the same and securing the purchase-money or rents thereof.

Fifth. If you know of your own knowledge or from the declarations of said Hubbard, state the reason why such property was held in the name of such person or persons, and not in the name of said Hubbard.

Sixth. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

JAMES & MARINER,
Defendant's Solicitors.

Cross-interrogatories to be propounded to John A. Messinger, a witness for the defendant:

1st cross-interrogatory Did you execute a conveyance of lots No. seven and eight, in section No. nine, of township 7, range 22, to Cyrus D. Davis?

2d do. Did you ever give to Otis Hubbard your promissory notes,
69 either as part of the consideration for said lots when you received the title, or for any other cause?

3d do. Did you execute the deed to said Davis at the request of said Hubbard, and were said notes, or any portion of them, surrendered to you as a consideration for the deed or property?

4th do. Have you testified before on the same subject-matter as witness, and did you testify in the same manner as you now testify?

BROWN & OGDEN,
Solicitors for Complainants.

Cross-interrogatories to be propounded to Sylvester Pettibone, a witness for the defendant:

1st cross-interrogatory. If you answer anything in regard to the pecuniary situation of Otis Hubbard, state particularly your means of knowing about his situation.

2d do. When did you last have any business with Otis Hubbard, and when did you last have a conversation with him about his pecuniary situation, and where was it, and who was present? and give the words of the entire conversation (if you testify as to any conversation in your direct examination.)

3d do. Have you been examined previously on the same subject-matter as a witness; and if so, did you testify in the same manner as you now testify?

4th do. State whether you have or have had any business relations with John J. Orton, and what?

BROWN & OGDEN.
Solicitors for Complainants.

United States district court, district of Wisconsin.

GEORGE SMITH }
vs.
JOHN J. ORTON. }

Interrogatories to be propounded to Cyrus D. Davis, a witness to be sworn and examined in the above-entitled cause, on the part of the defendant, before Winfield Smith, esq., commissioner, under and by virtue of a commission to issue out of said court, to contain the direct interrogatories herein contained, and such cross-interrogatories as may be filed by the complainant within ten days from the filing hereof:

First interrogatory. Do know the parties to this suit?

Second do. Did you execute a deed of lots seven and eight, in section nine north, of range twenty-two east, to David Knab, and when?

Third do. At the time you executed such deed, (if any was executed,) was there any understanding or agreement, in writing or otherwise, that said lots seven and eight were, upon any condition whatever, to revert or be conveyed to you?

70 Fourth do. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of your examination, or the matters in question in this cause? If yea, state the same fully and at large in your answer.

JAMES & MARINER,
Defendant's Solicitors.

Cross-interrogatories to be propounded to Cyrus D. Davis, a witness to be sworn in behalf of the defendant:

1st cross-interrogatory. Will you state what took place between you, Hubbard, and Butler, in regard to conveying to Knab? And state *all* that took place.

2d do. Was anything said, one way or the other, in regard to the estate reverting to you; and if there was, what was said?

BROWN & OGDEN,
Solicitors for Complainants.

U. S. district court, district of Wisconsin.

GEORGE SMITH
vs.
JOHN J. ORTON.

Interrogatories to be propounded to Franklin Ripley, jr., a witness to be sworn and examined in the above-entitled cause, on the part of defendant, before Winfield Smith, commissioner of said court, by virtue of a commission issuing out of said court, to contain the direct interrogatories herein contained, and such cross-interrogatories as may be filed by the said complainant within ten days from the filing hereof:

First. Do you know the parties to this suit?

Second. Did you know Tertullus D. Butler, David Knab, and Joseph Schram in A. D. 1848?

Third. Were you a subscribing witness to the bonds, copies of which are annexed to this commission, marked "A" and "B"? And if yea, state if you know whether the said Knab understood the contents of said bonds at the time of their execution, and what were your opportunities of knowing, and whether he acknowledged the execution of said bonds to you as notary public, according to your certificate thereunto annexed?

Fourth. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters at issue in this cause? If yea, set forth the same fully and at large in your answer.

JAMES & MARINER.
Defendant's Solicitors.

71 Cross-interrogatories to be propounded to Franklin Ripley, a witness for the defendant:

1st cross-interrogatory. Did you ever see Joseph Schram or David Knab before they came into your office, upon the subject of the instruments to Schram and Butler; and have you seen the said Knab since to recognize him, and how often since? Would you know him if you should see him?

2d cross-interrogatory. At the time of the signing of the instruments, or at any time before, was the interest of Otis Hubbard either in the property sold to Schram and mentioned in the bond to him, and in that deeded to Knab, disclosed, or anything said about it? Was Otis Hubbard present during any of these transactions, or was the whole business done by Butler?

3d do. How many times did Knab come into your office on the business? Did he ever come, and how many times alone, without Schram?

4th do. How long ago did you take the acknowledgment of the instrument referred to? Did you draw up any other at about the same time? and if so, can you mention any, and give the particulars about them, if you can. Mention them, and give them particularly.

5th do. Is Knab a German; and could he at that time speak English tolerably well?

6th do. If you shall testify that Knab made any objections to the bond of Butler, will you specify what the objections, or any one of the objections, were?

7th do. Have you testified about these same matters in a certain suit wherein John J. Orton was complainant, and David Knab defendant? If so, when was it, and did you give the same accounts of said matters as you now give?

BROWN & OGDEN,
Solicitors for Complainants.

("A.")

Schedule A, annexed to Commission.

Know all men by these presents, that we, Tertullus D. Butler and David Knab, of the city of Milwaukie, and State of Wisconsin, holden and stand firmly bound and obliged unto Joseph Schram, of the same place, in the full and just sum of two thousand dollars, lawful money, to be paid unto the said Joseph Schram, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, each and every of them, firmly by these presents. Witness our hands and seals, dated the twenty-second day of July, in the year of our Lord one thousand eight hundred and forty-eight.

Whereas the said Butler and Knab, for and in consideration of the sum of nine hundred dollars, have agreed to convey to said Schram the following real estate, situated in the second ward of said city of Milwaukie, viz: a part of lots five (5) and six (6), in block forty-three (43), commencing on Chestnut street, twenty-five feet east of the northwest corner of said lot five (5); then south one hundred and twenty feet (120); thence west, parallel with the north line of said lot, twenty-five feet (25) to the west line of said lot five (5); thence north on said west line sixty (60) feet; thence west, parallel with the north line of said lot six (6), ten (10) feet; thence north, parallel with the east line of said lot six (6), sixty feet to the north line of said lot six (6); thence east thirty-five (35) feet along the north lines of said lots five and six (5 and 6), to the place of beginning, being twenty-five front on Chestnut street, by one hundred and twenty feet deep of said lot five (5), and ten feet front on Chestnut street by sixty feet deep of said lot six (6): And whereas the title to said premises above described is now in Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, and the said Butler and Knab have agreed to procure from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard a deed of the said premises to themselves, the said Butler and Knab, and to do such further acts as may be necessary to make the title to said premises free, and clear of all and every incumbrance or incumbrances in themselves, the said Butler and Knab: And whereas the said Butler and Knab have, for the consideration above mentioned, agreed to convey to said Schram, his heirs and assigns forever, the above premises by a good and sufficient deed in law, in fee simple, with full covenants of warranty against all and every incumbrance or incumbrances, of what name and kind soever, except a lease of said premises for the term of one year from the first day of May, A. D. 1848; said deed to be executed within three months from the date hereof, and to be delivered to said Schram, upon the execution by said Schram, and delivery to said Butler and Knab, of a mortgage upon said premises for the sum of three hundred and fifty dollars, payable in eighteen months from the date hereof, with seven per cent. per annum interest: And whereas said Butler and Knab have further agreed that said Schram shall have immediate possession of said premises, subject to said lease above-mentioned: Now the condition of this obligation is such, that if the said Butler and Knab shall procure a deed as above mentioned from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, within three months from the date hereof, and shall convey said premises to said Schram as above agreed, and shall well and truly perform all their agreements in this instrument contained, then this obligation to be void; otherwise to remain in full force and virtue.

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T. D. BUTLER, [L. S.]
DAVID KNAB. [L. S.]

Signed, sealed, and delivered in presence of—
FRANKLIN RIPLEY,
CHARLES K. WELLS.

73 STATE OF WISCONSIN,
Milwaukie County, ss:

On this 22d day of July, A. D. 1848, personally came before me Tutullus D. Butler and David Knab, to me known to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed, for the use and purpose therein mentioned.

FRANKLIN RIPLEY,
Notary Public.

For value rec'd of J. J. Orton, I hereby sell, assign, and set over to said Orton, his heirs and assigns, the within bond, and all my right, title, and interest in and to the same, empowering him to acquire all the right and advantage and property conveyed by the same. Witness my hand and seal this first day of August, A. D. 1851.

J. B. SCHRAM, *G. S.*

In presence of—
A. HENRY BEILFELD,
SZUSZUS RUINYUN.

MILWAUKIE COUNTY,
State of Wisconsin, ss:

On this 1st day of August, 1851, personally came before me the above named Joseph B. Schram, to me known to be the person who executed the above assignment, and acknowledged that he executed the same.

A. HENRY BEILFELD,
Notary Public.

(B.)

Schedule B, annexed to commission.

Know all men by these presents, that I, David Knab, of the city and county of Milwaukie, Wisconsin, am held and firmly bound unto Tertullus D. Butler, of the same place, in the sum of two thousand dollars, lawful money; for the payment of which sum, well and truly to be made to the said Butler, his heirs, executors, administrators, and assigns, I bind myself, my heirs, executors, and assigns, each and every of them, firmly by these presents. Sealed with my seal and dated this twenty-second day of July, A. D. 1848.

Whereas the said Knab has, jointly with said Butler, executed to one Joseph Schram a bond of even date herewith, wherein said Butler and Knab bind themselves, their heirs, &c., to execute to said Schram a deed of a part of lots five and six (5 and 6), in block forty-three (43), in the second ward of said city of Milwaukie, for a more particular description of which premises reference may be had to said bond: And whereas said Butler and Knab in said bond further agree to procure a deed of said premises, in said bond described, from
74 Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, to themselves, the said Butler and Knab, before said Butler and Knab should execute the deed as above mentioned to said Schram: And whereas said Butler and Knab in said bond made certain other agreements to and with said Schram, for which agreements, and for a full explanation of all the agreements of said Butler and Knab with said Schram, reference is hereby made to said bond: And whereas said Knab executed said bond, with said Butler, to said Schram as security for said Butler for the performance of the covenants and agreements on the part of said Butler and Knab in said bond contained: And whereas said Butler has agreed to procure the deed from said Emily Hubbard, Julia Bates,

Emily Jewell, and Lewis F. Hubbard, to said Butler and Knab, as in said bond mentioned, at the proper cost and expense of himself, the said Butler: And whereas the said Butler has agreed to save the said Knab harmless from all damages, cost, charges, or expense from or on account of said bond: And whereas said Butler has agreed to perform at his own cost all the agreements which said Butler and Knab in said bond have obligated themselves to perform: And whereas the said Knab, in consideration that the said Butler shall at his own cost and expense procure the deed above mentioned from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, and shall at his, the said Butler's, own cost and expense, perform all the agreements which said Butler and Knab in said bond have obligated themselves to perform, except wherein said Butler and Knab agree to execute to said Schram a deed of said premises, which said Butler and Knab are both to execute, has agreed to convey to said Butler the following described real estate, viz: lots seven (7) and eight (8) of section nine (9), in township No. seven (7) north, of range No. twenty-two (22) east, in the district of lands subject to sale at Milwaukie, Wisconsin, except three acres of said tracts of land heretofore sold by Cyrus D. Davis: Now, therefore, the condition of this obligation is such, that if, on the performance on the part of said Butler of his agreements as in the bond mentioned, said Knab shall execute to said Butler, his heirs and assigns, a deed of said last described premises, free and clear of all incumbrances suffered through or under him, the said Knab, then this obligation to be void; otherwise in full force, power, and virtue.

DAVID KNAB. [L. S.]

In presence of—
F. RIPLEY,
CHAS. K. WELLS.

STATE OF WISCONSIN,
Milwaukie County, ss:

On this 22d day of J'y, A. D. 1848, before me personally appeared
75 David Knab, to me known to be the person who executed the foregoing bond, and acknowledged the same to be his free act and deed.

FRANKLIN RIPLEY,
Notary Public.

In consideration of twenty-one hundred dollars, to be paid by J. J. Orton, I hereby sell, assign, transfer, and set over to him, his heirs or assigns, all my right, title, and interest in and to the within bond or writing obligatory, and all right and interest, property, real estate, &c., &c., accruing or to accrue by reason of the same; and I hereby empower said Orton to pursue all legal means to the recovery and full enjoyment of the same.

Witness my hand and seal this 22d day of February, A. D. 1851.

The words "transfer," and "his heirs or assigns," interlined before execution.

T. D. BUTLER. [L. S]

In presence of—
ELIH SPENCER,
HERMAN C. BEVERING.

STATE OF WISCONSIN,
Milwaukie County, ss:

Be it known that on this 13th day of March, A. D. 1851, before me personally came the above T. D. Butler, to me known to be the person who executed the above instrument, and acknowledged that he executed the same for the uses and purposes therein mentioned.

HERMAN C. BEVERING,
Notary Public, residing in Milwaukie City.

The within bond and ass't received for record March 15, A. D. 1851, at 4 o'clock p. m., and recorded in volume 32 of Deeds, in pages 466 and 467.

MORITZ SHOEFFLER,
Reg. Mil. Co.
By J. B. ZANLER, *Dep'y.*

And afterwards, to wit, on the 27th day of February, A. D. 1854, the said commission was returned with the depositions of the said witnesses thereunto annexed, which said depositions are as follows:

DISTRICT OF WISCONSIN:

Depositions of Tertullus D. Butler, John A. Messenger, Cyrus D. Davis, Sylvester Pettibone, and Franklin Ripley, jr., witnesses called, produced, sworn, and examined on the part of the defendant in a certain cause
76 pending in the district court of the United States for the district of Wisconsin, in a certain suit pending in said court, wherein George Smith is complainant and John J. Orton is defendant, in pursuance and by virtue of a commission issued out of said court and to me directed, and which is herewith returned.

Tertullus D. Butler, being duly sworn, in answer to the first direct interrogatory saith: I know Mr. Orton; I do not know Mr. Smith.

In answer to the second interrogatory he saith: I did once own an equitable interest in the premises mentioned in said interrogatory, which I claimed under a bond for a deed given to me by David Knab; I cannot annex a copy, for I have not the original or a copy in my possession.

In answer to the third direct interrogatory the witness says: I disposed of it to John J. Orton.

In answer to the fourth direct interrogatory the witness says: The consideration for such sale was either $2,100 or $2,200, I am not positive, and it was paid to me.

In answer to the fifth direct interrogatory he saith: I knew Otis Hubbard from 1842 to the time of his death.

In answer to the fifth direct interrogatory he saith: His pecuniary condition was embarrassed; I understood that he had real and personal property in the name of other persons.

In answer to the seventh interrogatory he says: I understood from him that his embarrassments at the east were the cause of his property being in the name of other persons, and not in his own name.

In answer to the last direct interrogatory he saith: I don't know but I may; but I cannot make any definite answer to so broad and indefinite question.

T. D. BUTLER.

In answer to the first cross-interrogatory the witness says: I am the person mentioned in said instrument.

In answer to the second cross-interrogatory the witness says: Yes.

F. RANDALL, *Commissioner.*

In answer to the third cross-interrogatory the witness says: They were so conveyed for that purpose.

In answer to the fourth cross-interrogatory he saith: I think he did.

In answer to the fifth cross-interrogatory he saith: I purchased before the deed from Davis to Knab; I purchased from Otis Hubbard, a short time previous to Davis's making out the deed; I paid nothing to Knab; he had no interest in it, except as collateral security, for signing the bond to Schram.

In answer to the sixth cross-interrogatory he saith: I received nothing

77 in writing from Hubbard as evidence of such purchase; it was all in parol. I don't know that any one was present when the bargain was made between us. Mr. Hubbard had, during two years previous to the conveyance, had conversations on the matter with me, in which, for various considerations, Mr. Hubbard had expressed his intention to convey to me some property, and the bond referred to in my answer to the second direct interrogatory was executed in pursuance of his directions to carry such intention into effect.

In answer to the seventh cross-interrogatory he saith: I did not pay any money at the time as a consideration for the land. Mr. Hubbard owed me, for money and merchandise previously received by him from me, about eight hundred dollars.

In answer to the eighth cross-interrogatory he saith: I think I was sworn as a witness in such a cause, and testified substantially as stated in said interrogatory.

In answer to the ninth cross-interrogatory he saith: I have no distinct recollection on the subject, but I may have so sworn, although my present impression is that the indebtedness commenced in 1843, and that I so testified.

In answer to the tenth cross-interrogatory he saith: I cannot give the items of such indebtedness for the reason that my books of account were stolen, and I do not know where they are.

In answer to the eleventh cross-interrogatory he saith: I had regular account books, in which the items of charges against said Hubbard were regularly entered; they have not been in my possession for about three years; they were stolen from my possession, but I cannot tell how or by whom.

In answer to the twelfth cross-interrogatory he saith: I have not, unless it may be an order from Hubbard for $80, and I do not know where that is; such advances were generally made upon his verbal order.

In answer to the thirteenth cross-interrogatory he saith: I was engaged from 1844 and '5 to 1849, mostly in the tobacco business. Hubbard was out of business; he had no family; was unmarried, and boarded with me a part of the time, and after quitting boarding occupied one of my rooms for a while.

In answer to the 14th cross-interrogatory he saith: I did.

In answer to the fifteenth cross-interrogatory he saith: I do not know that Hubbard was present at the time mentioned in said interrogatory; the whole was done with his cognizance, and in pursuance of his direction and request; I acted under his directions.

In answer to the sixteenth cross-interrogatory he saith: I have no recollection of so doing.

In answer to the seventeenth cross-interrogatory the witness says: I did take such acknowledgment; Hubbard directed Davis to execute said deed, and said acknowledgment was taken at the request of Hubbard.

In answer to the eighteenth cross-interrogatory he saith: Hub-
78 bard was not present when the deed was acknowledged; I went to the house to take it, at his request, and took away the deed.

In answer to the nineteenth cross-interrogatory he saith: I did; I cannot tell where it is; I don't know.

In answer to the 20th cross-interrogatory he saith: The consideration of such sale to Mr. Orton was $2,100 or $2,200; it was to be paid mostly in money; some in paying incumbrances and other claims. He paid me at different times, but in whose presence I cannot state, about twelve hundred dollars; the balance in paying other demands, for which I was liable in connexion with this transaction.

In answer to the 21st cross-interrogatory he saith: I think there was no

witness of the bargain between us; and said Orton did not execute to me any writing for the purchase-money, or any part of it, or for any other purchase.

In answer to the 22d cross-interrogatory he saith: Said Orton did not ask nor did I give him at or prior to said assignment of said bond any information as to how or from whom I acquired my interest in said premises.

In answer to the 23d cross-interrogatory he saith: I do not recollect that I ever said anything to Mr. Orton about my purchase from Hubbard.

In answer to the 24th cross-interrogatory he saith: I was so examined; I designed, and think I did on such examination give the same account of the transaction that I now give.

In answer to the 25th cross-interrogatory he saith: I think I did file an answer in such suit, and I think gave the same account of the matter as I now give.

In answer to the 26th cross-interrogatory he saith: Hubbard boarded with me off and on from 1843 to 1850. I cannot tell precisely how much time he spent there; I think as much as three-fourths of the time; when he did not board with me, he boarded at several different places which I cannot enumerate.

In answer to the 27th cross-interrogatory he saith: I think, if my property could have been disposed of, I was worth over and above my debts, from 1844 to 1849, fifteen hundred dollars; I have never ceased to pay my debts wholly; I pay them as fast as I am able.

In answer to the 28th cross-interrogatory he saith: I spent it.

In answer to the 29th cross-interrogatory he saith: I decline answering said interrogatory, unless I can have the liberty of explaining it by stating all the details, and explain the whole.

T. D. BUTLER.

John A. Messinger, being duly sworn, deposes, says:

In answer to the first direct interrogatory: I did know the late Otis Hubbard from 1857 to the time of his death; he resided in Milwaukie.

In answer to the second direct interrogatory he saith: He was reputed to be very much embarrassed.

79 In answer to the 3d direct interrogatory he saith: He did claim to own property in the name of other persons, and I think in his own name also. I derive my knowledge from his own statement, and I think I conveyed some to him myself.

In answer to the 4th direct interrogatory the witness says: He did exercise acts of ownership on such property, and received rents and made leases.

In answer to the 5th direct interrogatory he saith: I knew from the statement of said Hubbard that the reason that such property was held in the name of some person other than himself was that he was embarrassed by debts at the east.

In answer to the 6th direct interrogatory he saith: I don't know that I can without having my attention more particularly directed.

Being cross-examined, the said witness—

In answer to the first cross-interrogatory saith: I don't now recollect; cannot state positively without referring to the record; I think, however, that I did.

In answer to the 2d cross-interrogatory the witness saith: I have no recollection for what particular piece or parcel of land I gave him notes; I do recollect having given him notes as consideration for holding the title of land.

In answer to the 3d cross-interrogatory he saith: My impression is, that the deed to Davis was executed at the request of Hubbard, and that some

notes given by me to Hubbard were surrendered as a consideration for the deed. I claimed no beneficial interest in the land, but held it in trust for him.

In answer to the 4th cross-interrogatory he saith: I was once a witness before Mr. Terrey in a case to which Mr. Orton was a party, and testified according to the best of my recollections then as well as now.

J. A. MESSINGER.

Cyrus D. Davis, being duly sworn, saith:

In answer to the first direct interrogatory: I do.

In answer to the 2d cross-interrogatory he saith: I did execute a quit-claim deed to Mr. Knab, of the premises in question, several years ago, but do not recollect the precise time.

In answer to the 3d direct interrogatory he saith: There was not.

In answer to the 4th direct interrogatory he saith: I don't know that I can.

In answer to the first cross-interrogatory he saith: Mr. Hubbard requested me to convey to Knab, and stated that Mr. Butler would attend to it, and that whatever Mr. Butler did would be satisfactory to him. This is the substance of what took place. I cannot state more particularly.

In answer to the second cross-interrogatory he saith: I do not recollect that anything was said about the estate reverting to me at all; I think nothing was said.

CYRUS D. DAVIS.

80 Sylvester Pettibone, being duly sworn, deposes and testifies as follows:

In answer to the first direct interrogatory he saith: I did know the late Otis Hubbard from the winter of 1836 to the time of his death

In answer to the second cross-interrogatory he saith: I cannot tell as to his pecuniary situation except from what he said to me.

In answer to the third direct interrogatory he saith: He claimed to own a blacksmith shop in Milwaukie, which I rented of him; he gave me a lease in the name of Batsford, of Chicago; he said that his business was such at the east that he could not do anything in his own name; he also claimed to own other property in the name of persons other than himself; I paid him rent for said shop, and my means of knowledge arose from my doing business with him, and his declarations.

In answer to the 4th interrogatory he saith: My answer to this is embraced in my answer to the 3d interrogatory.

In answer to the 5th direct interrogatory he saith: I have no other means of knowledge than the declarations of said Hubbard, which was, that his business at the east was such that he could not hold property in his own name.

In answer to the 6th direct interrogatory he saith: That I do not know that I can.

Being cross-examined, the said witness saith—

In answer to the first cross-interrogatory: I have no means of knowing about his pecuniary situation, except from his own declarations, and my renting the shop of him, as stated in my direct testimony.

In answer to the second cross-interrogatory he saith: The last time that I recollect having any business with Mr. Hubbard was in November, 1840 or 1841, or had any conversation with him about his pecuniary situation, it was on the canal in this city. I cannot tell for certain who was present; I think Mr. Griffith was at one time; he came into the woods where we were

getting the timber for the dam, and grumbled about our getting it from his land ; I cannot recollect the precise conversation ; he threatened pretty hard.

In answer to the 3d cross-interrogatory he saith : I have not been examined previously as to this matter.

In answer to the 4th cross interrogatory he saith : I sold Mr. Orton a house and lot ; have had no other business transaction with him, except that I borrowed fifty dollars of him, and paid it.

SYLVESTER PETTIBONE.

The said Sylvester Pettibone, desiring to correct his testimony, says, that on reflection he answers to the 3d cross-interrogatory : I stated that he procured Mr. Orton to purchase a house and lot, which was sold on a foreclosure of a mortgage.

SYLVESTER PETTIBONE.

81 The said Sylvester Pettibone again desires to correct his answer to the 3d cross-interrogatory and saith : That on reflection he answers that he was sworn and examined previously as to the same subject-matter of this examination, and according to the best of his recollection testified in the same manner that he now does.

SYLVESTER PETTIBONE.

Franklin Ripley, being duly sworn, doth testify as follows :

In answer to the first direct interrogatory he saith : I know Mr. Orton ; I do not know the complainant personally.

To the 2d direct interrogatory he saith : I did know Tertullus D. Butler, David Knab, and Joseph Schram, in 1848.

To the 3d direct interrogatory he saith : I was subscribing witness to two bonds of the same date and similar purport with these, of which the papers annexed to said commission, marked A and B, purport to be copies, and executed by the same parties and to the same parties. I think Mr. Knab must have understood their contents, for both Knab and Schram were in my office several times within two or three days previous to the date of the bond, and I drew two or three bonds before they were satisfied with the one they finally executed ; they were both very particular as to the contents of the bonds ; Mr. Knab did acknowledge the execution of the bond according to my certificate.

In answer to the fourth interrogatory he saith : I do not.

In answer to the first cross-interrogatory the witness says : I think I had never seen Schram previous to the time they came into my office to get the bond drawn, but think I had seen Knab before ; am not certain as to either ; I have seen Knab several times since, but could not have called him by name, until I saw him within two or three weeks ; I should now know him if I should see him

In answer to the 2d cross-interrogatory he saith : Not to my knowledge ; Hubbard was not present on either of the occasions referred to by me ; the business was done by Butler's direction.

In answer to the 3d cross-interrogatory he saith : I should say at least three times ; I think he never came without Schram.

In answer to the 4th cross-interrogatory he saith : I took the acknowledgment of the instruments referred to about five and a half years ago ; I did draw up many others, but can give no particulars about them ; I remember this on account of having frequently been called upon about it by Schram.

In answer to the fifth cross interrogatory he saith : Knab is a German, and I think he could talk English pretty well.

In answer to the 6th cross-interrogatory he saith : I do not recollect that any objections were made to the bonds, or either of them, as finally executed.

In answer to the 7th cross-interrogatory he saith: I have; in the
82 circuit court last month; I then stated that I was not positive that I could recognize Knab if I should see him, but since I testified I have met him in the street, and recognized him at once; in other respects I believe my testimony then was the same as it is now.

FRANKLIN RIPLEY, JR.

DISTRICT COURT OF THE UNITED STATES
for the District of Wisconsin, ss:

I, Francis Randall, one of the masters of this court, do certify that, in pursuance and by virtue of the commission hereto annexed, I caused the said witnesses therein named to be subpœnaed to attend before me on Thursday, the day of February instant, and that the said T. D. Butler, J. A. Messinger, C. D. Davis, S. Pettibone, and F. Ripley, jr., did attend as required; that on that day, and from day to day until the 27th day of February inst., I proceeded in taking the testimony of said witnesses, under said commission; that said witnesses, before testifying, were each severally sworn to testify the truth, the whole truth, and nothing but the truth; that the above foregoing testimony of said witnesses was taken down by me, as given by them, and having first been carefully read over to them, was subscribed by said witnesses, respectively, in my presence.

F. RANDALL.

Feb. 27th, 1854.

This indenture, made the twentieth day of July, in the year of our Lord one thousand eight hundred and forty-eight, between Cyrus D. Davis and Caroline his wife, of the first part, and David Knab of the second part, all of the city and county of Milwaukie, in the State of Wisconsin, witnesseth: That the said parties of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States, to them in hand paid, the receipt whereof is hereby acknowledged, have bargained, sold, remised, released, and quit-claimed, and by these presents do bargain, sell, remise, release and quit-claim unto the said party of the second part, his heirs and assigns forever, all the following described lots or tracts of land situate in the said county of Milwaukie, in the State of Wisconsin, to wit, lots seven and eight (7 and 8) of section nine (9), in township seven (7) north, of range twenty-two (22) east, except three acres in said tracts heretofore sold and conveyed to ; to have and to hold the same, together with all and singular the appurtenances and privileges
83 thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title, interest and claim whatsoever of the said parties of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CYRUS D. DAVIS. [SEAL.]
CAROLINE DAVIS. [SEAL.]

Signed, sealed, and delivered in presence of—
DANIEL G. DAVIS,
T. D. BUTLER.

STATE OF WISCONSIN,
Milwaukie County, ss:

On the 21st day of July, A. D. 1848, came before me Cyrus D. Davis and Caroline, his wife, the above named grantor, and acknowledged the execu-

tion of the foregoing deed, freely and voluntarily, for the use and purpose therein mentioned.

T. D. BUTLER,
Justice of the Peace.

Received for record July 22d, A. D. 1848, at 10½ o'clock p. m., and recorded in vol. 25 of Deeds, page 136.

J. E. CAMERON,
Reg. Mil. Co.

Know all men by these presents, that whereas one Lewis F. Hubbard, of the city of Rochester, in the State of New York, Emily Jewell, of Granville, in the State of Massachusetts, and Julia Bates, of East Granville, in the State of Massachusetts, are seized in fee of the following described land in the second ward of the city and county of Milwaukie, in the State of Wisconsin, to wit: the west half of lot No. five (5), and ten (10) feet by sixty (60) feet off east side of lot (6), block forty-three (43), it being the same parts of lots deeded by Thos. McLean and wife to George Hubbard and Emily Hubbard during their lives, and then reverting to us in fee: Now know ye, that we, the said Lewis F. Hubbard, Emily Jewell, and Julia Bates, have made, constituted and appointed, and by these presents do make, constitute and appoint Otis Hubbard, of the city and county of Milwaukie, State of Wisconsin, our true and lawful attorney, for us and in our names to sell and dispose of the above described property absolutely in fee simple, for such price or sum of money, and to such person or persons, as he shall
84 think fit and convenient, and also for us and in our name, and as our act and deed to sign, seal, execute and deliver such deeds and conveyances for the absolute disposal thereof, or any part thereof, with such clauses, covenants and agreements to be therein contained as our said attorney shall think fit and *expedite*, hereby ratifiying and confirming all such deeds, conveyances, bargains and sales which shall at any time hereafter be made by my said attorney touching or concerning the premises.

In witness of the foregoing authority I, Lewis F. Hubbard, have on this 21st day August, 1848, and I, Emily Jewell, have on this 15th day of December, 1848, and I, Julia Bates, have on this day, 1848, severally put our hands and seals.

LEWIS F. HUBBARD. [SEAL.]
EMILY J. JEWELL. [SEAL.]

Signed, sealed, and delivered in presence of—
GEO. R SMITH,
T. D. BUTLER,
for Lewis F. Hubbard.
J. W. BISSELL,
ELLEN JEWELL,
for Emily Jewell.

STATE OF WISCONSIN,
County of Milwaukie, ss:

On this 21st day of August, A. D. 1848, personally appeared before me the above named Lewis F. Hubbard, and acknowledged signing the foregoing power of attorney for the purposes therein expressed.

T. D. BUTLER,
Justice of the Peace.

STATE OF NEW YORK,
Monroe County, ss:

On the 15th day of December, 1848, personally appeared before me, the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take acknowledgment and proof of instruments under seal, to be used or recorded in said State of Wisconsin, Emily Jewell, to me known to be one of the persons described in the above instrument, who, in a private examination apart from her husband, acknowledged that she executed the same freely, without fear or compulsion of her husband.

Witness my hand and seal.

J. W. BISSELL. [SEAL.]

Recorded November 19th, A. D. 1850, at 10½ o'clock a. m.

85 STATE OF WISCONSIN,
Milwaukie County, Register's Office:

I, Charles J. Kern, register of the county of Milwaukie, do hereby certify that the foregoing instrument has been carefully compared by me with the instrument recorded in my office, in vol. 32 of Deeds, on page 146; that it is a correct and true copy of it, and that it is the whole of it.

CHARLES J. KERN,
Register Milwaukie Co., Wis.

MILWAUKIE, *September 26th*, A. D. 1853.

To all to whom these presents shall come, greeting:

Know ye, that I, Emily Hubbard, of East Granville, in the State of Massachusetts, for and in consideration of the sum of forty dollars, lawful money of the United States of America, to me in hand paid by Otis Hubbard, of the city and county of Milwaukie, in the State of Wisconsin, at or before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, have remised, released, and forever quit-claimed, and by these presents do remise, release, and forever quit-claim unto the said *said* Otis Hubbard, and to his heirs and assigns forever, all my right, title, and interest in and unto the following described property, to wit: The west half of lot number five (5), and ten (10) feet by sixty (60) feet off the east side lot number six (6), in block number forty-three (43), in the second ward of the city of Milwaukie, in the State of Wisconsin: to have and to hold the said released premises unto the said Otis Hubbard, his heirs and assigns, to his own proper use and behoof forever.

In testimony whereof, I, the said Emily Hubbard, have hereunto set my hand and seal this fifteenth day of December, in the year of our Lord one thousand eight hundred and forty-eight.

EMILY HUBBARD. [SEAL.]

Sealed and delivered in the presence of—
J. W. BISSELL,
WILLIAM TERELL.

STATE OF NEW YORK,
Monroe County, ss:

On this 15th day of December, 1848, personally appeared before the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take acknowledgment and proof of instruments
86 under seal, to be used or recorded in said State of Wisconsin, Emily

Hubbard, to me known to be the person described in the within instrument, who acknowledged that she executed the same.

Witness my hand and seal.

J. W. BISSELL. [SEAL.]

Recorded July 8th, A. D. 1850, at 3¾ o'clock p. m.

STATE OF WISCONSIN,
Milwaukie County, Register's Office:

I, Charles J. Kern, register of Milwaukie county, do hereby certify that the foregoing instrument has been carefully compared by me with the instrument recorded in my office, in vol. 31, on pages 137 and 138; that it is a true copy of it, and that it is the whole of it.

CHARLES J. KERN,
Register Milwaukie Co., Wis.

MILWAUKIE, *September 26th*, A. D. 1853.

This indenture, made the 31st day of January, in the year of our Lord eighteen hundred and forty-nine, between Charles F. Bates and Julia Bates, his wife, of Granville, in the county of Hampden and State of Massachusetts, parties of the first part, and Otis Hubbard, party of the second, of the city of Milwaukie and State of Wisconsin, witnesseth: That the said parties of the first part, in consideration of the sum of one dollar, to them in hand paid, the receipt whereof is hereby acknowledged, have remised, released, sold, conveyed and quit-claimed, and by these presents do remise, release, sell, convey, and quit-claim unto the said party of the second part, his heirs and assigns forever, all the right, title, and interest of the said parties of the first part in and to the following real estate, situated in the second ward of the city of Milwaukie, and State of Wisconsin, viz: The west half of lot five (5), and ten feet by sixty feet off from the east side of lot No. six (6), in block number forty-three (43): to have and to hold the same, together will all and singular the appurtenances and privileges thereto belonging, to the proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CHARLES F. BATES, [SEAL.]
JULIA BATES. [SEAL.]

Signed, sealed and delivered in the presence of—
VINCENT HOLCOMBE,
JULIA H. GOWDY.

87 COMMONWEALTH OF MASSACHUSETTS,
Hampden County, ss:

On the 31st day of January, A. D. 1849, came before me Charles F. Bates and Julia Bates, his wife, the above named grantors, and acknowledged the execution of the foregoing deed freely and voluntarily for the uses and purposes therein mentioned.

VINCENT HOLCOMBE,
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS,
Hampden, ss:

I, Richard Bliss, clerk of the judicial courts of the Commonwealth for the county of Hampden, do certify that Vincent Holcombe, esquire, whose signa-

ture is affixed to the certificate on the paper hereto annexed, was at the date thereof one of the justices of the peace within and for said county, duly commissioned, and acting under authority of this Commonwealth, and that full faith and credit are and ought to be given to his acts and attestations done in that capacity, and that I am acquainted with the handwriting of the said Holcombe, and believe his signature to said certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the court of common pleas for said Commonwealth, this seventh day of February, in the year of our Lord one thousand eight hundred and forty-nine.

RICHARD BLISS,
Clerk.

Recorded November 19th, A. D. 1850, at 10½ o'clock a. m.

STATE OF WISCONSIN,
Milwaukie County, Register's Office:

I, Charles J. Kern, register of Milwaukie county, do hereby certify that the foregoing instrument has been carefully compared by me with the instrument recorded in my office in vol. 32 of Deeds, on p. 145; that it is a correct and true copy of it, and that it is the whole of it.

CHARLES J. KERN,
Register Milwaukie Co., Wis.

MILWAUKIE, *September 26th*, A. D. 1863.

This indenture, made the first day of March, in the year of our Lord one thousand eight hundred and fifty, between William Jewell and Emily
88 Jewell, his wife, of Rochester, in the State of New York, parties of the first part, and Otis Hubbard, of Milwaukie, in the State of Wisconsin, party of the second part, witnesseth: That the said parties of the first part, in consideration of one dollar, lawful money of the United States, to them in hand paid, the receipt whereof is hereby acknowledged, have remised, released, sold, conveyed and quit-claimed, and by these presents do remise, release, sell, convey, and quit-claim unto the said party of the second part, his heirs and assigns forever, all that certain real estate situate in said city of Milwaukie, in the county of Milwaukie, in the State of Wisconsin, known and described as follows, to wit: The west half lot numbered five (5), and ten (10) feet by sixty (60) feet off the east side of lot No. six (6), in block No. forty-three (43), in the second ward of said city, being the same premises heretofore conveyed by Thomas McLean to George Hubbard and Emily Hubbard during their lives, by a certain deed signed and acknowledged by the said McLean and wife: to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest and claim whatsoever of the said parties of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written. The erasure of four lines in the above was made before singing.

WILLIAM JEWELL. [SEAL.]
EMILY J. JEWELL. [SEAL.]

Signed, sealed, and delivered in presence of—
J. WEGMAN,
J. A. LEDUNN.

STATE OF NEW YORK,
Monroe County, ss:

On the first day of June, A. D. 1850, came before me *came* William Jewell and Emily J., his wife, the above named grantors, and acknowledged the execution of the foregoing deed freely and voluntarily, for the use and purpose therein mentioned.

J. WEGMAN,
Comm'r of Deeds.

STATE OF NEW YORK,
Monroe County, Clerk's Office:

I certify that John Wegman, esquire, was at the date of the certificate of proof or acknowledgment of the annexed instrument in writing, a commissioner of deeds in and for said county, duly authorized to take the same; that I
89 am well acquainted with his handwriting, and verily believe that the signature to said certificate is genuine, and that the annexed instrument is executed and acknowledged according to the law of this State.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county this first day of June, A. D. 1850.

[SEAL.] JOHN T. LACY, *Clerk.*

Recorded November 19th, A. D. 1850, at 10½ o'clock a. m.

STATE OF WISCONSIN,
Milwaukie County, Register's Office:

I, Charles J. Kern, register of Milwaukie county, hereby certify that the foregoing instrument has been fully and carefully compared by me with the instrument recorded in my office in vol. 32, p. 144; that it is a true copy of it, and that it is the whole of it.

CHARLES J. KERN,
Register Milwaukie, Wis.

MILWAUKIE, *September 26th*, A. D. 1853.

This indenture, made the fourth day of July, in the year of our Lord one thousand eight hundred and fifty, between Otis Hubbard and Lewis F. Hubbard, by his attorney, Otis Hubbard, parties of the first part, and Joseph Schram, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of two thousand dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have given, granted, bargained, sold, remised, released, aliened, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, remise, release, alien, convey, and confirm unto the said party of the second part, his heirs and assigns forever, all those certain pieces or lots of land situated in the county of Milwaukie, in the State of Wisconsin, known and described as follows, to wit: A part of lots No. five (5) and six (6), in block No. forty-three (43), commencing on Chestnut street, twenty-five (25) feet east of the northwest corner of said lot No. five; thence running south one hundred and twenty feet; thence west, parallel with the north line of said lot five, twenty-five feet to the west line of said lot five; thence north on said west line sixty (60) feet; thence west, parallel with the north line of said lot six (6), ten (10) feet; thence north, parallel with the east line of said lot six, sixty feet to the north line of said lot six; thence east, along the north lines of said lots five and six, thirty-five feet to the place of beginning; being twenty-five feet front on Chestnut street, by one hundred and twenty feet deep of said lot No. five, and ten feet front on said street by
90 sixty (60) feet deep of said lot No. six (6) in the second ward of the

city of Milwaukie; together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and all the estate, right, title, interest, claim, or demand whatsoever of the said parties of the first part, either in law or equity, either in possession or expectancy of, in, and to the above bargained premises and their hereditaments and appurtenances: to have and to hold the said premises as above described, with the hereditaments and appurtenances, unto the said party of the second part, his heirs and assigns, forever. And the said parties of the first part, for themselves, their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents they are well seized of the premises above described, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and that the same are free and clear from all incumbrances whatever, and that the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming the whole or any part thereof, they will forever warrant and defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"Five" interlined in the above description, and one hundred erased before signing.

OTIS HUBBARD. [SEAL.]
LEWIS F. HUBBARD, [SEAL.]
By his Attorney, OTIS HUBBARD.

Sealed and delivered in presence of—
T. D. BUTLER.
CHARLES E. JENKINS.

STATE OF WISCONSIN,
County of Milwaukie:

Be it remembered, that on the eighth day of July, A. D. 1850, personally came before me the above-named Otis Hubbard and the said Lewis F. Hubbard, by his attorney Otis Hubbard, to me known to be the persons who executed the said deed, and acknowledged the same to be their free act and deed, for the uses and purposes therein mentioned.

CHARLES J. JENKINS,
Notary Republic, Mil. Co.

Recorded November 19, A. D. 1850, at 10½ o'clock a. m.

91 STATE OF WISCONSIN,
Milwaukie County, Register's Office:

I, Charles J. Kern, register of Milwaukie county, hereby certify the foregoing instrument has been carefully compared by me with the instrument recorded in my office in vol. 32, on p. 142; that it is a correct and true copy of it, and that it is the whole of it.

MILWAUKIE, *September* 26, A. D. 1853.

CHARLES J. KERN,
Register Milwaukie County, Wis.

This indenture, made the seventh day of June, in the year of our Lord one thousand eight hundred and fifty-one, between Otis Hubbard, of the city of Milwaukie, State of Wisconsin, of the first part, and Joachim F. Gruenhagen, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar to him in hand paid by the said party of

the second part, the receipt whereof is hereby confessed and acknowledged, has given, granted, bargained, sold, remised, released and quit-claimed, and by these presents do give, grant, bargain, sell, remise, release, and quit-claim unto the said party of the second part, to his heirs and assigns forever, all of lots seven (7) and eight (8) of section number nine, (No. 9), township number seven, (7), of range number twenty-two (number 22) east, in the town and county of Milwaukie, State of Wisconsin, containing seventy-four $\frac{47}{100}$ acres, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining; and all the estate, right, title, interest, claim, or demand whatsoever of the said party of the first part, either in law or equity, either in possession or expectancy, of, in, and to the above-bargained premises, and their hereditaments and appurtenances: to have and to hold the said premises as above described, with the hereditaments and appurtenances, unto the said party of the second part, and to his heirs and assigns forever. In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

OTIS HUBBARD. [SEAL.]

Sealed and delivered in presence of—
P. POUDE.
CHAS. E. JENKINS.

STATE OF WISCONSIN,
County of Milwaukie:

92 On the 7th day of June, A. D. 1851, came before me Otis Hubbard, the above-named grantor, and acknowledged the execution of the foregoing deed freely and voluntarily, for the uses and purposes therein mentioned.

CHAS. E. JENKINS,
Notary Republic Mil. Co.

Received for record January 13th, A. D. 1853, at 5 o'clock p. m., and recorded in vol. 37 of Deeds, on pages 327 and 328.

CHARLES J. KERN,
Register Milwaukie Co., Wis.

This indenture, made the thirty-first day of December, in the year of our Lord one thousand eight hundred and fifty-two, between Joachim F. Gruenhagin and Caroline his wife, of the county of Milwaukie and State of Wisconsin, parties of the first part, and Jas. S. Brown, of the city of Milwaukie, in the said State, party of the second part, witnesseth:

That the said parties of the first part, in consideration of one thousand dollars, lawful money of the United States, to them in hand paid, the receipt whereof is hereby acknowledged, have remised, released, sold, conveyed, and quit-claimed, and by these presents do remise, release, sell, convey, and quit-claim, unto the said party of the second part, his heirs and assigns forever, all those certain pieces, parcels, or lots of land, situate, lying, and being in the county of Milwaukie, State of Wisconsin, known and described as lots number seven (7) and eight (8), of section numbered nine (9), in township numbered seven (7) north, of range numbered twenty-two (22) east, containing seventy-four $\frac{47}{100}$ acres, more or less: to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever, of the said parties of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns forever. And the said parties of the first part, for their heirs, executors, and adminis-

trators, do covenant and agree to and with the said party of the second part, his heirs and assigns, that they will warrant and defend the aforesaid premises to be free and clear of all claim or claims, of all and every person claiming or to claim by, through, or under them, and none other.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOACHIM F. GRUENHAGIN. [SEAL.]
CAROLINE GRUENHAGIN. [SEAL.]

Signed, sealed, and delivered in presence of—
P. C. HALL.
O. G. HILLARD.

93 THE STATE OF WISCONSIN,
County of Milwaukie:

Be it remembered, that on the thirty-first day of December, A. D. 1852, personally came before me the above named Joachim F. Gruenhagin and Caroline his wife, to me known to be the persons who executed the said deed, and acknowledged the same to be their free act and deed, for the uses and purposes therein mentioned.

P. C. HALL,
Notary Public, residing in Milwaukie County.

Received for record January 13th, A. D. 1853, at 5 o'clock p. m., and recorded in vol. 37 of Deeds, on page 327.

CHARLES J. KERN,
Register Milwaukie Co., Wis.

This indenture, made the first day of January, in the year of our Lord one thousand eight hundred and fifty-three, between James S. Brown, of the city of Milwaukie, State of Wisconsin, party of the first part, and George Smith, of the city of Chicago, State of Illinois, party of the second part, witnesseth:

That the said party of the first part, in consideration of one dollar, lawful money of the United States, to him in hand paid, the receipt whereof is hereby acknowledged, has remised, released, sold, conveyed, and quit-claimed, and by these presents does remise, release, sell, convey, and quit-claim, unto the said party of the second part, his heirs and assigns forever, all his right, title, and interest in and to lots numbered seven (7) and eight (8), of section nine (9), in township seven (7), of range twenty-two (22), in the county of Milwaukie, State of Wisconsin: to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever, of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever. And the said party of the first part, for his heirs, executors, and administrators, does covenant and agree to and with said party of the second part, his heirs and assigns, that he will warrant and defend the aforesaid premises to be free and clear of all claim or claims of all and every person claiming or to claim by, through, or under him, and none other.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JAMES S. BROWN. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN DALE.
DAVID B. OGDEN.

94 THE STATE OF WISCONSIN,
County of Milwaukie:

Be it remembered, that on the twenty-fourth day of March, A. D. 1853, personally came before me the above-named James S. Brown, to me known to be the person who executed the said deed, acknowledged the same to be his free act and deed, for the uses and purposes therein mentioned.

DAVID B. OGDEN,
Not. Pub., residing in Milwaukie City.

This indenture, made the twelfth day of January, in the year of our Lord one thousand eight hundred and fifty-three, between Cyrus D. Davis and Caroline his wife, both of the city of Milwaukie, and State of Wisconsin, parties of the first part, and George Smith, of Chicago, in the State of Illinois, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of one dollar, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have remised, released, and quit-claimed, and by these presents do remise, release, and quit-claim unto the said party of the second part, to his heirs and assigns forever, lots number seven (7) and (8) eight, of section numbered nine (9), in township seven (7) north, of range twenty-two (22) east, in the county of Milwaukie, containing seventy-four $\frac{74}{100}$ acres, more or less: to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim, whatsoever, of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CYRUS D. DAVIS. [SEAL.]
CAROLINE DAVIS. [SEAL.]

Signed, sealed, and delivered in the presence of—
LOUIS FRANCHERE.
HARRIET ELLMAKER.

STATE OF WISCONSIN,
County of Milwaukie:

On the 31st day of January, A. D. 1853, came before me Cyrus D.
95 Davis, and Caroline his wife, the above-named grantors, and acknowledged the execution of the foregoing deed freely and voluntarily, for the uses and purposes therein mentioned.

LOUIS FRANCHERE,
Notary Public, City of Milwaukie.

Received for record January 31st, A. D. 1853, at 5½ o'clock p. m., and recorded in vol. 37 of Deeds, on pages 392 and 393.

CHARLES J. KERN,
Register Milwaukie Co., Wis.

This indenture, made the twenty-ninth day of January, in the year of our Lord one thousand eight hundred and fifty-three, between David Knab, of the city of Milwaukie, State of Wisconsin, and Wilhelmina his wife, parties of the first part, and George Smith, of the city of Chicago, State of Illinois, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar, to them in hand paid by the said party

of the second part, the receipt whereof is hereby confessed and acknowledged, have remised, released, and quit-claimed, and by these presents do remise, release and quit-claim unto the said party of the second part, to his heirs and assigns forever, lots numbered seven (7) and eight (8), in section numbered nine (9), in township seven (7) north, of range twenty-two (22) east, in the county of Milwaukie, containing seventy-four $\frac{47}{100}$ acres, except three acres thereof conveyed by Cyrus D. Davis to Peter Baerg: to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest and claim whatever of the said parties of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

DAVID KNAB. [SEAL.]
WILHELMINA KNAB. [SEAL.]

Signed, sealed, and delivered in presence of—
W. W. GRAHAM.
F. SAUER.

STATE OF WISCONSIN,
County of Milwaukie:

On the 29th day of January, A. D. 1853, came before me David Knab
96 and Wilhelmina Knab his wife, the above-named grantors, and acknowledged the execution of the foregoing deed freely and voluntarily, for the uses and purposes therein mentioned.

W. W. GRAHAM,
Notary Public.

Recorded January 29th, A. D. 1853, at 5 o'clock p. m., and recorded in vol. 37 of Deeds, on page 387.

CHARLES J. KERN,
Register Milwaukie Co., Wis.

STATE OF WISCONSIN,
Milwaukie County:

I hereby certify that I have made diligent examination in the office of register of deeds of said Milwaukie county for some paper, instrument, or document, or record, conveying to T. D. Butler the west $\frac{1}{2}$ of lot 5, and 10 by 60 feet, off the east side of lot 6, bl. 43, in the second ward of the city of Milwaukie, or some part thereof, or some interest therein, or signed by the said Butler, conveying the same to one Schram, and such paper, instrument, document or record cannot be found.

Given, Milwaukie, October 27th, A. D. 1853.

CHARLES J. KERN,
Register Milwaukie Co., Wis.

DAVID MCDOUGALL
vs.
OTIS HUBBARD *et als.* } In chancery.

In the above-entitled cause, a decree was entered against said defendants, on the sixteenth day of February, A. D. 1851, that they pay to the complainant the sum of one hundred twenty-eight $\frac{33}{100}$ dollars, with costs of suit, taxed at twenty-six $\frac{71}{100}$ dollars, and the said decree now remains wholly unsatisfied.

H. K. WHITE, *Clerk.*

April 21, 1852.

For value received, I hereby sell and assign to J. B. Selby, jr., a certain claim against the estate of Otis Hubbard, deceased, amounting to one hundred
97 and sixty-eight $\frac{74}{100}$ dollars, and do authorize the administrator of said estate to pay said Selby that or any other amount that may become payable to me.

DAVID McDOUGAL.

MILWAUKIE, *Sept. 5th*, 185

Extract from report of commissioners.

"Names of claimants ; claims allowed ; balance against estate.
"DAVID McDOUGALL.

"Judgment, $168 74. $168 74."

Received, Milwaukie, Sept. 8th, 1853, of J. A. Laphnm, administrator of the estate of Otis Hubbard, fourteen hundred twelve and $\frac{83}{100}$ dollars, in discharge of the following named accounts, allowed by the commissioners in said estate, which accounts have been duly assigned to me, to wit:

Ac't allowed Jenkins	$131 36	
Wier	2 80	
Goetz	11 00	
Swyer	34 38	
Messinger	55 00	
Stadler	176 00	
Comstock	13 39	
Smith	3 03	
Smith & Burkett	5 66	
Curtiss	15 00	
Beardsley	17 12	
Phelps	50 74	
Kalekoff	5 16	
Jennings	1 54	
Van Duen	4 94	
Ely	4 25	
Bean	22 32	
Powell	190 73	
Comstock	39 82	
Kilborn	433 57	
Dewey	6 64	
McDougall	168 74	
Richard	4 12	
		1,397 31
Ten per cent. off		1,257 58
Powell		155 25
Total		$1,412 83

J. B. SELBY, JR.

98 MILWAUKIE COUNTY, *ss:*
Probate Office.

I hereby certify that the foregoing are true and correct copies of original papers on file in the probate office of Milwaukie county, in the estate of Otis Hubbard, deceased.

Dated Milwaukie, April 17th, 1854.

CHARLES E. JENKINS.
County Judge.

Fees $1, paid.

("N.")

Schedule N.

MILWAUKIE, *Aug.* 11*th*, 1845.

$200 00.

Six months from date, for value received, I promise to pay Otis Hubbard, or bearer, two hundred dollars, with interest.

T. D. BUTLER.

MILWAUKIE, *Aug.* 11*th*, 1845.

$239 00.

Twelve months from date, for value received, I promise to pay Otis Hubbard, or bearer, two hundred and thirty-nine dollars, with interest.

T. D. BUTLER.

MILWAUKIE, *June* 25*th*, 1847.

$100 00.

Eight months after date, for value received, I promise to pay Otis Hubbard, or bearer, one hundred dollars, with interest at ten per cent.

T. D. BUTLER.

MILWAUKIE, *Sept.* 16*th*, 1847.

$50 00.

Two months after date, for value received, I promise to pay Otis Hubbard, or bearer, fifty dollars, with 12 per cent. interest.

T. D. BUTLER.

MILWAUKIE, *Oct* 16*th*, 1847.

$140.

Three months after date, for value received, I promise to pay Otis Hubbard, or bearer, one hundred and forty dollars, with ten per cent. interest.

T. D. BUTLER.

99 MILWAUKIE, *July* 22*d*, 1848.

$300 00.

One year after date, for value received, I promise to pay Otis Hubbard, or order, three hundred dollars, with 10 per cent. interest.

T. D. BUTLER.

MILWAUKIE, *May*, 11*th*, 1850.

$15 00.

Sixty days from date, for value received, I promise to pay Otis Hubbard, or bearer, fifteen dollars.

T. D. BUTLER.

MILWAUKIE, *May* 11*th*, 1850.

$15 00.

Sixty days from date, for value received, I promise to pay Otis Hubbard, or bearer, fifteen dollars.

T. D. BUTLER.

The above note for the sum of $239, dated Aug. 11th, 1845, has the following endorsement on the back of the same, to wit: 1847, Jan. 12th, rec'd one hundred dollars on the within note.

(Signed) OTIS HUBBARD.

STATE OF WISCONSIN,
Supreme Court, ss:

I, La Fayette Kellogg, clerk of the supreme court, State of Wisconsin, do hereby certify that the above and foregoing are true and correct copies of eight certain notes on file in my office, in a certain cause now pending in said court, in which J. J. Orton is complainant and appellant, and David Knab is defendant and appellee. That I have compared the same with the said original notes on file, and that they are correct transcripts therefrom.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Madison, this 13th day of April, A. D. 1854.

[L. S.] LA FAYETTE KELLOGG,
Clerk Sup. Court of Wisconsin.

Tertullus D. Butler, being first duly sworn, deposes and says:

(Def'ts object to this witness as being interested, being assignor of the bond and obligee therein.)

Question. Did you ever own lots 7 and 8, in sec. 9, town. 7, R. 22?

100 Answer. I suppose I did own them; there was a bond given by myself, in conjunction with David Knab, and in consideration of said Knab's joining me in the bond, by my direction a deed of the above described lots was put into Knabb's hands, as collateral security for the fulfilment of the conditions of said bond. When the condition was fulfilled, Knabb was to deed the property to me.

(Def'ts objects to all parol statements contained in the answer of the witness of the contents of any paper executed to him, and of any parol contract or understanding existing as to the title of the land.) [The bonds above referred to are the same mentioned in the bill; this is admitted by the parties.]

Question. What did you do with your interest in that land?

Answer. I disposed of it to John J. Orton.

Question. Have you been paid for it?

Answer. I have.

Question. Where did you get your title to the land?

(Def'ts objects to any parol testimony as to the title acquired.)

Answer. I got it through Otis Hubbard, by virtue of a certain bond.

Quest. Who executed that bond? Who were the parties to it?

Answer. David Knab and myself.

Quest. Who was it executed to?

Answer. To one Schram.

Quest. Have you got that correct?

Answer. I believe I have.

Quest. Which bond do you claim title under?

Answer. The bond from David Knab to myself.

Quest. Was that bond from Mr. Knab to you executed with the knowledge of Mr. Hubbard?

Answer. It was, and by his special directions.

Quest. When executed and delivered, whose property was the bond?

Answer. It was mine.

Quest. Had Mr. Knab been informed of the terms and conditions of that bond before signing it?

Answer. He had. He knew all about it.

Quest Who did you pay for the land and the interest in the land conveyed in the bond?

Answer. I paid Otis Hubbard.

Quest. Do you know whether Mr. Davis held the title to this land once?

Answer. He did.
Quest. Do you know for whom he held it?
Answer. He held it for Otis Hubbard.
Quest. Do you know to whom he conveyed it?
Answer. He conveyed it to Knab, under Otis Hubbard's directions.
Quest. Did you ever hear the directions given by Mr. Hubbard to Mr. Davis for the conveyance of this land?
101 Answer. Not personally when Hubbard and Davis were present, but Hubbard told me that he had directed Mr. Davis to execute the deed according to the understanding, and that he had requested him to deliver it to me when I called for it, which he finally did.
(Def'ts objects to any conversation between Hubbard and witnesses for the purpose of showing title in witness.)
Adj. to 2 o'clock p. m.

2 o'clock p. m.

The parties again appeared, and the examination proceeded as follows:
Quest. How long had you known Mr. Hubbard before he died?
Answer. Between 9 and 10 years.
Quest. Do you know whether, during that time, he was pecuniarily embarrassed?
Answer. He was.
Quest. To what extent?
(Objected to as irrelevant.)
Answer. I should judge to a considerable extent, but have no means of judging, except from his method of doing his business.
Quest. How long did it continue?
Answer. I believe it continued till the time of his death.

Cross-ex.

You have stated that you paid Otis Hubbard for the land in dispute. State how much you paid.
(Objected to as immaterial and as impertinent.)
Answer. I boarded the old gentleman for four or five years. I furnished him with merchandise some, and let him have some money. There was a running account between us. Agreeable to that account he would have owed me $1,000, but under the extraordinary circumstances he owed me over $2,000.
How much money did you let him have in all?
Answer. I had an account running with him from 4 to 5 years without a settlement. I should think that during that time I let him have $500 or $600, in cash, but he had let me have some also.
When did these five or six years commence, and when end?
Ans. I should think from 1844 or 1845 to 1849 or 1850.
When did you make the arrangement by which you were to have the land in question?
Ans. It had been talked about some time previous to the date of the bond—perhaps a year and a half; not perhaps in relation to this particular property, but some property.
When was it definitely arranged between you that you were to have the specific land in question?
Ans. When the bond was executed from David Knab to me.
At the time the bond was given did you pay any money to Hubbard?
102 Ans. I don't know that I did at that particular time.
Did you pay any part of the consideration mentioned, subsequently to the giving of the bond?

Ans. I think not.

How long prior to the date of the bond was the last payment in money made by you?

Ans. There was a payment of $80 I made him at one time, which I think was made about a week before, but am not sure.

How much was the payment, and who was present, and did you take a receipt?

Ans. $80; I think no one was present; I did not take a receipt.

Was the accounts of yours, alluded to as running for so many years, entered upon a book, and what vouchers have you for the same?

Ans. It was entered upon a book, but whether any vouchers are now in my possession is very questionable. After the death of my wife, about two years ago, and a year before, I missed my books, and have not been able to find what became of them.

In whose possession, and where do you believe those books are now, and who took them?

Ans. I cannot answer; they were important to the heirs of my wife's estate, but whether that had anything to do with it I do not know.

Had you any other vouchers except said books?

Ans. I think not; I may possibly have some orders on me for money from Otis Hubbard.

Will you look for such orders, and produce them to the commissioner, Tenney?

Ans. I will look, and if I find them I will do so.

Who was present when you and Otis Hubbard made the arrangement alluded to?

Ans. No person.

Did Otis Hubbard direct Knab to give the bond to you alluded to above?

Ans. He did.

Did you and said Knab talk the matter over, so that Knab fully understood the contents of the bond running to you?

Ans. We did.

Were there charges in your books against said Hubbard for board, and at what rate per week?

Ans. There were; at the rate of $2 50, $3 00, and $3 50 per week; also there were charges for rent of room.

What was the amount, and what the nature of the merchandise you let said Hubbard have?

Ans. Tobacco, cigars, groceries, tea, sugar, coffee.

How did said Hubbard use the tea, sugar, and coffee?

Ans. I cannot say; sometimes he had men at work whom he furnished; sometimes for men employed by his nephew; I cannot state the amount of the merchandise separately.

103 Did you draw the deed, and take the acknowledgment from Davis and wife to Knab?

Ans. I did not draw the deed, but think I took the acknowledgment. (This answer objected to.)

Whose lots were those mentioned in the bond to Schram, and for whose benefit were they sold to Schram?

Ans. They were Otis Hubbard's lots, and were sold for his benefit.

At about the time of the date of the bond were you in the grocery business?

Ans. No, sir; I was in the manufacture of cigars and tobacco, but I was in the way of procuring groceries, and always did when he wanted them; I had been in the grocery business previously, during part of the year 1844 and 1845.

Subsequently to 1844 and '5, were you in embarrassed circumstances?

Ans. I was not.

What was the extent of your property from 1844 to the date of the bond? (Objected to by the compl'ts.)

Ans. I was out of debt, but had not much property; I had more than enough to pay my debts always, but I had not enough to carry on the business I was in, without some embarrassment; I do not think I was then worth $1,000.

Did you immediately, after giving up the grocery business, commence the tobacco business?

Ans. It may have been from 4 to 6 months before I did so.

How long after the date of the bond did you cease paying your debts and give up your tobacco business?

Ans. About a year and a half after.

When did you assign the bond to the complainants?

Ans. At the date of the assignment on the back of the bond.

How much did complainant pay you for the same?

Ans. The consideration was $2,100.

When and how did he pay you?

Ans. (Under objection.) He paid at that time, I think, about $800 in cash, and subsequently $300, and again about $200, I think; he also at that time agreed to release me from certain liabilities.

What liabilities did he agree to release you from?

Ans. I cannot really state particularly; there was one in relation to a Schram bond; another that was due to Judge Paine, of about $120; also some minor obligations to some individuals, probably not far over $100 more.

Was the amount due Judge Paine a judgment recovered by said Paine as attorney *vs.* Otis Hubbard, in favor of Mrs. McDougal?

Ans. I think it was.

Why and how were you bound to pay it?

Ans. It appears to me it was on account of the Schram bond.

Did you take any writing from the complainant to the effect that he would pay or release those liabilities, or to any other effect?

104 Ans. I did not; I think not; I regarded it as essential to his own security to do it, as to my own.

Did you receive any other moneys from the complainant besides those above set forth, or anything else besides these moneys and the agreement to release as aforesaid?

Ans. I think there was $50 in money that I had after the execution of the transfer to Mr. Orton.

Did this assignment take place before or after you were broken up in business?

Ans. After.

What did you do with the money received from complainants?

Ans. Spent it.

At the time you executed the assignment, or made your arrangements with the complainant, did you claim in his presence any other title to the premises than that through the bond assigned?

Ans. I did not.

Did you state to said complainant any other title in your arrangement above set forth by you with Hubbard?

(Objected to.)

Ans. I certainly gave Mr. Orton to understand at that time that I had an arrangement with Mr. Hubbard, and how it came about; I think I did, but am not positive; on reflection, I think I did not; I am confident I stated to Mr. Orton that the moment *of* the bond given by Mr. Knab and myself to

Schram was complied with, he would execute a deed of the land agreeably to the terms of his bond, either to myself or another, as I might direct.

At the time when the bond was executed by Knab was Hubbard generally under the influence of liquor?

Ans. He generally was in the habit of drinking, but he never would transact any business when under the influence of liquor. He was perfectly sober when the bond was executed.

Who was present when you received the money from complainant, or made your arrangement with him?

Ans. I think his brother was in the office, but don't know as he knew anything about the transaction; Mr. Benenway, I think, was present.

Did both the witnesses to the assignment sign at the same time?

Ans. I believe they did.

Was the money paid at the time of the witnessing of the assignment?

Ans. I think it was; that is, the largest sum, the $800; the $300 was paid in about 3 months after, the $200 about 2 months later still, and the remaining $50 in about a year after.

After the bond assigned by you was written, was it read over to Knab, or did Knab read it?

Ans. It was read over to Mr. Knab.

105 Have you filed an answer to a bill in chancery in which you have given any different account of the matters about which you here testify from that now given by you?

Ans. I do not think I have given any different account. I have filed an answer in chancery.

Direct resumed.

What did you mean when you said extraordinary circumstances?

Ans. I spoke of the extraordinary trouble of taking care of a man of Mr. Hubbard's habits and character. He was in the habit of getting drunk, and made a great deal of trouble; I was frequently called from my business to protect my family from his violent and obstreperous conduct.

Was the amount paid Hubbard by you received by him as a full payment for his interest in the lands described in said bond executed by Knab?

Ans. It was, with other considerations connected with his residence with me in my family.

Who was to perform the conditions of the bond to Schram?

Ans. David Knab and myself. I was the principal and he surety.

Were you doing a fair business during the period that Hubbard lived with you, up to the time of the execution of the bond?

Ans. I was.

When you first spoke to Mr. Orton about the sale of said lots, did you agree to give a deed?

Ans. I agreed to procure him a deed.

Was there anything said about a bond at that time?

Ans. I think not.

What was the bargain first made for, the land or the bond?

Ans. The land; and gave him the bond to carry out the sale.

Did you not represent to complainant that you owned the whole interest in said lands, and that no other person had any claim thereto; and was any mention made of Hubbard having any claim or anything to do to said premises until after the commencement of this suit? What did you say to Orton about Hubbard having any interest in those premises before the commencement of this suit?

Ans. I represented to him that no person had any claim on the property but myself; that I knew of none.

You stated in your cross-examination that you told the complainant of your relations with Hubbard in regard to these lands; was that before or after the commencement of the suit of Otis Hubbard *vs.* Orton, Knab, and Butler?

Ans. I think it was after.

Did you, previous to the commencement of the last mentioned suit, ever tell Orton that Hubbard ever claimed to have any interest in said premises?

Ans. I never did.

106 Was the obligation to fulfil the bond to Schram for Hubbard's benefit; and was he the party interested in having the conditions of that bond fulfilled?

Ans. It was, and he was.

Did you expend any money or time in fulfilling the conditions of the bond to Schram, and how much?

Ans. I did both; about $120 in money, and time worth $30. The $120 was spent in going to Rochester to procure releases, in order to comply with the bond to Schram.

Adjourned to 2 o'clock p. m. of Nov. 10, 1853.

Nov. 10th, 2 o'clock p. m.

The parties again appeared, and the examination of Mr. Butler proceeded as follows:

Cross-examination.

Did you change the nature or terms of your bargain after you first made it with complainant?

Ans. I did not.

Did the complainant ask you how you acquired title, or the nature of it, or complain of the nature of your title?

Ans. He did not.

You say that you told him you were the owner of the land; did complainant at any time ask how you became so, or did the matter pass without remark?

Ans. He asked how I became so.

Did you then tell him how you became so as you have here stated it, or did you tell a different story?

(Objected to.)

Ans. I told him I got it through Otis Hubbard; that is, I told him so after the commencement of the suit.

You stated, in reply to a question from defendant, that you disclosed to complainant the fact of deriving title through Hubbard; you afterwards, in reply to a question from complainant, intimated a doubt as to that. Did you in the mean time hear complainant state that you did not tell him?

(Objected to.)

Ans. I do not recollect of having intimated that I had told Orton, prior to the closing of the sale, that I did derive title through Hubbard; I did not hear Orton make any such statement.

Have you, since the commencement of this suit, received any money from the complainant?

Ans. I have.

How much have you received?

(Objected to.)

107 Ans. Fifty dollars. I borrowed it of him, and gave security for it. I borrowed it of him, and had hard work to get it, too.

Have you received any other money from complainant since the commencement of this suit?

Ans. I have not.

What, if any, directions did you give for the conveyance of land to Knab? To whom were the directions given, and what were the words?

Ans. It is so long ago that I do not recollect distinctly. Otis Hubbard gave the directions to Davis according to my agreement with Mr. Hubbard. I do not know the words.

Were you present when Hubbard gave the directions to Davis?

Ans. I was not. I think, however, that I subsequently saw Hubbard and Davis, and Hubbard stated to Davis that I would call and take an acknowledgement of the deed.

At the time you executed the assignment to complainant, did you take from him any paper or instrument in writing?

Ans. I did not.

Did you have any one as witness of the terms of the arrangement between you? and if so, whom?

Ans. There was no one, to my knowledge.

Was the complainant at that time a practicing lawyer?

Ans. I am not informed whether he was or not.

Have you seen your answer filed in case of Hubbard *vs.* yourself, Orton, and Knab. since the same was filed, or a copy of it?

Ans. I have not.

Where you yesterday in the office of complainant, and how long?

Ans. I was last evening. I was also in the morning of yesterday; I was there with Mr. Pettibone perhaps half an hour.

Was Mr. Pettibone there the whole time you were?

Ans. He was.

Did you receive from Schram any portion of the purchase-money of the lots conveyed by Hubbard to him?

Ans. I had a portion of it, perhaps $200, possibly more, which was paid to me after the signing of the bond which I held in trust for Mr. Hubbard and paid over to him as he wanted it. I paid it all over very soon. I had received, before the execution of the bond, $200 or $300 from Schram, which I used for awhile, and then paid over to Hubbard.

Did you fail to get the title of the lots perfected when you went to Rochester?

Ans. I accomplished all I went to Rochester to effect; but whether it perfected the title or not I do not know.

Direct resumed.

Do you recollect the suit of Otis Hubbard *vs.* yourself, J. J. Orton, and David Knab?

Answer. I do.

108 Do you recollect Mr. Orton asking you anything at that time of Hubbard's right or title to the bond in question to found such a suit upon?

Ans. I think Mr. Orton did ask me about Mr. Hubbard's right, and I told him we had no right.

(Objected to.)

Was not that the first time you ever mentioned to Orton Hubbard's having, or claiming to have, any title to the lands in question?

(Objected to as leading.)

Had you before that time told Orton of Hubbard's having or claiming any title to the lands in question?

(Objected to as leading.)

Ans. I think not.

What had you told Orton about Hubbard having or claiming to have title or interest in or to the lands in question previous to the time of the commencement of said suit?

Ans. I did not tell him anything.

Did he, that you know, have any knowledge of any title to the lands in question, save the title of record previous to that time?

Ans. He did not, to my knowledge.

Do you know whether he made out an abstract of the title to said lands previous to the purchase?

Ans. I believe he did.

In your cross-examination you said you told Orton that you derived title through Otis Hubbard; when did you tell him so?

Ans. Subsequent to the commencement of the suit above referred to.

Was not the fifty dollars which you say you have received from Orton since the commencement of this suit the same fifty that you said you received of Orton in your previous testimony?

Ans. It was. It was not properly mentioned previously. It was not part of the consideration of the assignment of the bond, but borrowed money.

The above testimony, called out by defendant, was all taken subject to objection on the part of complainant.

T. D. BUTLER.

Subscribed and sworn to before me this 10th day of November, 1853.

H. W. TENNEY,
Court Com. Mil. Co.

STATE OF WISCONSIN,
Supreme Court, ss:

I, La Fayette Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct copy
109 of the deposition of Tertullus D. Butler, on file in my office in a certain cause now pending in said supreme court, in which J. J. Orton is complainant and appellant, and David Knab is defendant and appellee.

That I have compared the same with the original deposition on file, and that it is a correct transcript therefrom.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Madison, this 13th day of April, A. D. 1854.

[L. S.] LA FAYETTE KELLOGG,
Clerk Sup. Court, Wisconsin.

Know all men by these presents, that we, Tertullus D. Butler and David Knab, of the city of Milwaukie and State of Wisconsin, holden and stand firmly bound and obliged unto Joseph Schram, of the same place, in the full and just sum of two thousand dollars, lawful money, to be paid unto the said Joseph Schram, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, each and every of them, firmly by these presents.

Witness our hands and seals, dated the twenty-second day of July, in the year of our Lord one thousand eight hundred and forty-eight. Whereas the said Butler and Knab, for and in consideration of the sum of nine hundred dollars, have agreed to convey to said Schram the following real estate, situate in the second ward of said city of Milwaukie, viz: a part of lots five (5) and six (6) in block forty-three (43), commencing on Chestnut street twenty-five feet east of the northwest corner of said lot five (5), thence south one hundred and twenty feet (120), thence west parallel with the north line of said lot twenty-five feet (25) to the west line of said lot five (5), thence north on said west line sixty (60) feet, thence west parallel with the north line of said lot six (6) ten (10) feet, thence north parallel with the east line of said lot six (6) sixty feet to the north line of said lot six (6), thence east thirty-five (35) feet along the north line of said lots five and six (5 and 6) to the place of beginning, being twenty-

five feet front on Chestnut street by one hundred and twenty feet deep of said lot five (5), and ten feet front on Chestnut street by sixty feet deep of said lot six (6). And whereas the title to said premises above described is now in Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, and the said Butler and Knab have agreed to procure from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard a deed of the said premises to themselves, the said Butler and Knab, and to do such further acts as may be necessary to make the title to said premises free and clear of all and every incumbrance or incumbrances in themselves, the said Butler and Knab. And whereas the said Butler and Knab have, for the consideration above mentioned, agreed to convey to said Schram, his heirs and assigns, forever, the above premises by a good and sufficient deed in the law, in fee simple, with full covenants of warranty against all and every incumbrance or incumbrances of what name and kind soever, except a lease of said premises for the term of one year from the first day of May, A. D. 1848; said deed to be executed within three months from the date hereof, and to be delivered to said Schram upon the execution by said Schram and delivery to said Butler and Knab of a mortgage upon said premises for the sum of three hundred and fifty dollars, payable in eighteen months from the date hereof, with seven per cent. per annum interest. And whereas said Butler and Knab have further agreed that said Schram shall have immediate possession of said premises, subject to said lease above mentioned: Now the condition of this obligation is such, that if the said Butler and Knab shall procure a deed, as above mentioned, from said Emily Hubbard, Julia Bates, Emily Jewell and Lewis F. Hubbard, within three months from the date hereof, and shall convey said premises to said Schram as above agreed, and shall well and truly perform all their agreements in this instrument contained, then this obligation to be void; otherwise, to remain in full force and virtue.

110

T. D. BUTLER. [SEAL.]
DAVID KNAB. [SEAL.]

Signed, sealed, and delivered in presence of—
FRANKLIN RIPLEY.
CHARLES K. WELLS.

STATE OF WISCONSIN,
County of Milwaukie, ss:

On this 22d of July, A. D. 1848, personally came before me Tertullus D. Butler and David Knab, to me known to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed, for the uses and purposes therein mentioned.

FRANKLIN RIPLEY,
Notary Public.

Recorded July 22, A. D. 1848, at 2½ o' clock p. m.

STATE OF WISCONSIN,
Milwaukie County, Register Office:

I, Charles J. Kern, register of deeds for said county, do hereby certify that the foregoing is a true and correct transcript from the records in my office of the said instrument, recorded in volume 24 of deeds, on pages 424 and 425, and has been by me carefully compared with such record, and that it is the whole thereof. In testimony whereof, I have hereunto set my hand this 31st day of December, A. D. 1853.

CHARLES J. KERN, *Register, &c.*
By J. A. LIEBHARBER, *Deputy.*

End of testimony taken from former suit by agreement.

111 *Defendant's testimony.*

Record from circuit court of Mil. co. of Orton *vs.* Knab.

To the honorable the circuit court in and for the county of Milwaukee, in the State of Wisconsin.

Your orator, John J. Orton, of the city and county of Milwaukee, State of Wisconsin, humbly complaining, shows to this honorable court, that on the 22d day of July, in the year of our Lord one thousand eight hundred and forty-eight, David Knab, of the city, county, and State last aforesaid, being, or pretending to be, seized and possessed of certain lands lying and situate in the said county of Milwaukee, State of Wisconsin, described as lots seven and eight, of section nine, in township number seven north, of range number twenty-two east, in the district of lands subject to sale at Milwaukee, Wisconsin, except three acres of said tracts of land heretofore sold by Cyrus D. Davis. Tertullus D. Butler, of the city, county, and State aforesaid, entered into treaty with the said Knab for the absolute purchase of the said estate and premises above described, free and clear of all encumbrances suffered by, through, or under the said Knab, at and for a good, sufficient, and valuable consideration.

And your orator further shows to this honorable court, that thereupon the said David Knab made and executed a bond to the said Tertullus D. Butler, bearing date the day and year last aforesaid, respecting such sale and purchase, to the purport and effect following:

Know all men by these presents, that I, David Knab, of the city and county of Milwaukee, Wisconsin, am held and firmly bound unto Tertullus D. Butler, of the same place, in the sum of two thousand dollars, lawful money, for
112 the payment of which sum, well and truly to be made to said Butler, his heirs, executors, administrators, and assigns, I bind myself, my heirs, executors, and assigns, and each and every of them, firmly by these presents. Sealed with my seal and dated the 22nd day of July, A. D. 1848. Whereas the said Knab has, jointly with said Butler, executed to one Joseph Schram a bond of even date herewith, wherein said Butler and Knab bind themselves, their heirs, &c., to execute to said Schram a deed of a part of lots five and six, in block forty-three, in the second ward of the said city of Milwaukee, for a more particular description of which premises reference may be had to said bond; and whereas said Butler and Knab, in said bond, further agree to procure a deed of said premises, in said bond described, from Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, to themselves, the said Butler and Knab, before said Butler and Knab should execute the deed as above mentioned to said Schram; and whereas said Butler and Knab, in said bond, made certain other agreements to and with said Schram, for which agreements, and for a full explanation of all the agreements of said Butler and Knab with said Schram, reference is hereby made to said bond.

And whereas said Knab executed said bond with said Butler to said Schram as security for said Butler for the performance of the covenants and agreements on the part of said Butler and Knab in said bond contained; and whereas said Butler has agreed to procure the deed from Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, to said Butler and Knab, as in said bond mentioned, at the proper costs and expense of himself, the said Butler; and whereas the said Butler has agreed to save the said Knab harmless from all damage, costs, charges, or expense, from or on account of said bond; and whereas
113 said Butler has agreed to perform, at his own costs, all the agreements which said Butler and Knab in said bond have obligated themselves to perform; and whereas the said Knab, in consideration that the said Butler shall, at his own cost and expense, procure the above mentioned from said Emily

Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, and shall at his, the said Butler's, own cost and expense perform all the agreements which said Butler and Knab, in said bond, have obligated themselves to perform, except where said Butler and Knab agree to execute to said Schram a deed of said premises, which said Butler and Knab are both to execute, has agreed to convey to said Butler the following described real estate, viz: lots seven and eight, of section nine, in township No. seven north, of range No. twenty-two east, in the district of lands subject to sale at Milwaukee, Wisconsin, except three acres of said tract of land, heretofore sold by Cyrus D. Davis.

Now, therefore, the consideration of this obligation is such, that if, on the performance on the part of said Butler of his agreements as in this bond mentioned, said Knab shall execute to said Butler, his heirs and assigns, a deed of said last described premises, free and clear of all encumbrances suffered by, through, or under him, the said Knab, then this obligation to be void, otherwise in full force, power, and virtue.

DAVID KNAB. [L. S.]

In presence of—
F. RIPLEY.
CHAS. K. WELLS.

STATE OF WISCONSIN,
Milwaukee County, ss:

On this 22nd day of July, A. D. 1848, before me personally appeared David Knab, to me known to be the person who executed the foregoing bond, and acknowledged the same to be his free act and deed.

FRANKLIN RIPLEY,
Notary Public.

114 which said bond was, on the day and year last aforesaid, duly acknowledged before Franklin Ripley, a notary public in and for the county of Milwaukee, authorized and empowered by law to take acknowledgments of deeds and other instruments, as by the said bond, and acknowledgment thereon written, when produced, will appear.

And your orator further shows, that on the twenty-second day of February, in the year of our Lord one thousand eight hundred and fifty-one, the said Tertullus D. Butler, for a good and valuable consideration then received of your orator, sold, assigned, transferred, and set over to your orator, under his hand and seal, by an assignment written upon the back of said bond, all his right, title, and interest, in and to the said bond or writing obligatory, and all his right, interest, property, and real estate, accruing or to accrue under and by reason of said bond, which said assignment was, on the thirteenth day of March, in the year of our Lord one thousand eight hundred and fifty-one, was duly and properly acknowledged before Herman C. Bevering, a notary public in and for the county of Milwaukee, aforesaid, by the said Tertullus D. Butler, which said assignment and acknowledgment is in the purport and effect following, to wit:

In consideration of twenty-one hundred dollars, to me paid by John J. Orton, I hereby sell, assign, transfer, and set over to him, his heirs or assigns, all my right, title, and interest, in and to the within bond or writing obligatory, and all right and interest, property, real estate, &c., &c., accruing or to accrue, under and by reason of the same, and I hereby empower said Orton to pursue all legal means to the recovery and full enjoyment of the same.

Witness my hand and seal this 22nd day of February, A. D., 1851.

T. D. BUTLER. [SEAL.]

In presence of—
ELIHU SPENCER.
HERMAN C. BEVERING.

115 STATE OF WISCONSIN,
Milwaukee County, ss:

Be it known, that on this 13th day of March, A. D. 1851, before me personally came the above T. D. Butler, to me known to be the person who executed the above instrument, and acknowledged that he executed the same for the uses and purposes therein mentioned.

HERMAN C. BEVERING,
Notary Public, residing in Milwaukee City.

And your orator further ——, that said bond, assignment, and acknowledgment were duly and properly recorded in the office of the register of deeds, in and for the county of Milwaukee, the fifteenth day of March, in the year of our Lord one thousand eight hundred and fifty-one, at four o'clock in the afternoon, in volume thirty-two of Deeds, on pages 466 and 467, as by said record, when produced, will appear.

And your orator further shows unto your honorable court, that the bond to which reference is made in the bond above set forth is in the words, or to the purport and effect, following, to wit:

Know all men by these presents, that we, Tertullus D. Butler and David Knab, of the city of Milwaukee and State of Wisconsin, are held and firmly bound and obliged unto Joseph Schram, of the same place, in the full and just sum of two thousand dollars, lawful money, to be paid unto the said Joseph Schram, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, each and every of them, firmly by these presents. Witness our hands and seals, dated the twenty-second day of July, in the year of our Lord one thousand eight hundred and forty-eight. Whereas the said Butler and Knab, for
116 and in consideration of the sum of nine hundred dollars, have agreed to convey to said Schram the following real estate, situated in the second ward of the said city of Milwaukee, viz: a part of lots five and six, in block forty-three, commencing on Chestnut street twenty-five east of the northwest corner of said lot five; thence south one hundred and twenty feet; thence west, parallel with the north line of said lot, twenty-five feet, to the west line of said lot five; thence north, on said west line, sixty feet; thence west, parallel with the north line of said lot six, ten feet; thence north, parallel with the east line of said lot six, sixty feet, to the north line of said lot six; thence east, thirty-five feet, along the north line of said lots five and six, to the place of beginning—being twenty-five feet front on Chestnut street by one hundred and twenty-feet deep of said lot five, and ten feet front on Chestnut street by sixty feet deep of said lot six. And whereas the title to said premises above described is now in Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, and the said Butler and Knab have agreed to procure from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, a deed of the said premises to themselves, the said Butler and Knab, and to do such further acts as may be necessary to make the title to said premises free and clear of all and every encumbrance or encumbrnces in themselves, the said Butler and Knab; and whereas the said Butler and Knab have, for the consideration above mentioned, agreed to convey to said Schram, his heirs and assigns, forever, the above premises, by a good and sufficient deed in the law in fee simple, with full covenants or warranty against all and every encumbrance or encumbrances, of what name
117 and kind soever, except a lease of said premises for the term of one year from the first day of May, A. D. 1848, said deed to be executed within three months from the date hereof, and to be delivered to said Schram upon the execution by said Schram and delivery to said Butler and Knab of a mortgage upon said premises for the sum of three hundred and fifty dollars, payable in eighteen months from the date hereof, with seven per cent. per annum interest.

And whereas said Butler and Knab have further agreed that said Schram shall have immediate possession of said premises, subject to said lease above mentioned: Now the condition of this obligation is such, that if the said Butler and Knab shall procure a deed, as above mentioned, from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard within three months from the date hereof, and shall convey said premises to said Schram, as above agreed, and shall well and truly perform all the agreements in this instrument contained, then this obligation to be void, otherwise to remain in full force and virtue.

T. D. BUTLER. [L. S.]
DAVID KNAB. [L. S.]

Signed, sealed, and delivered in presence of—
FRANKLIN RIPLEY.
CHAS. K. WELLS.

STATE OF WISCONSIN,
Milwaukee County, ss:

On this 22d day of July, A. D. 1848, personally came before me Tertullus D. Butler and David Knab, to me known to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed, for the uses and purposes therein mentioned.

FRANKLIN RIPLEY,
Notary Public.

118 And your orator further shows, that on the first day of August, in the year of our Lord one thousand eight hundred and fifty-one, the said Joseph Schram, for a good and valuable consideration, sold, assigned, and set over to your orator the said bond last above set forth, and all right, title, and interest in and to the same, and empowering your orator to acquire all the rights, advantages, and property conveyed by the same, which said assignment was on the same day and year last aforesaid duly acknowledged by the said Schram before A. Henry Bielfield, a notary public in and for the county of Milwaukee, which said assignment and acknowledgment are in the words, and to the purport and effect following, to wit:

For value received of J. J. Orton, I hereby sell, assign, and set over to said Orton, his heirs and assigns, the within bond, and all my right, title, and interest in and to the same, empowering him to acquire all the rights and advantages and property conveyed by the same.

Witness my hand and seal, this first day of August, A. D. 1851.

J. B. SCHRAM. [L. S.]

In presence of—
A. HENRY BIELFIELD.
——— RINGON.

STATE OF WISCONSIN,
Milwaukee County, ss:

On this first day of August, 1851, personally came before me the above-named Joseph B. Schram, to me known to be the person who executed the above assignment, and acknowledged that he executed the same.

A. HENRY BIELFIELD,
Notary Public.

119 And your orator further shows, that by virtue of said assignments of the said bonds, he is now the bona fide owner of the same, and solely interested in the property and land thereby to be conveyed in his own right as the assignee of the said Knab and the said Schram, as he is informed and believes.

That the consideration for the sale and purchase of the lands mentioned in the bond, last above set forth, has been fully satisfied and discharged, and that the deed from Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, mentioned in said bond, has been procured from them according to the conditions of said bond.

And your orator further shows, that as the assignee of said Joseph Schram, of all his interest in said bond, and the property thereby conveyed, he has been fully satisfied by the performance of the conditions of said bond on the part of the said Butler and Knab, in part by your orator, and as to those conditions holds the said Butler and Knab fully and completely discharged.

And your orator further shows, that the said Butler and Knab have fully kept and performed all and singular the conditions of said bond, last above set forth, on their part, and the said Tertullus D. Butler has kept and performed all and singular his covenants and agreements and conditions mentioned or referred to in said bond, to the satisfaction of the said Schram, and to the satisfaction of your orator, and that the said bond is therefore completely fulfilled and discharged.

And your orator further shows unto this honorable court, that according to the conditions of the said bond, first above set forth, upon the performance upon his part of the agreements and conditions of the bond last above set forth,
120 the said Tertullus D. Butler, or his assigns, has become entitled to a deed of conveyance of the land first above described from the said David Knab, and that by virtue of the said assignment of said first mentioned bond to your orator, your orator has become and is now entitled to said deed of conveyance from said David Knab of said lands; and your orator hoped that the said David Knab would have specifically performed his agreement and the conditions of said bond, and have executed to your orator said deed of conveyance to said premises, first above described, according to said conditions, as in justice and equity he ought to have done. And although the said Tertullus D. Butler and your orator have kept and performed all the covenants, agreements, and conditions of said bond upon their part, and although the said Knab is satisfied that the said Butler and your orator have so kept and performed said covenants, agreements, and conditions, and although your orator, since the assignment to him of said bond, has frequently requested said Knab to perform the conditions of said bond on his part, and execute to your orator a deed of conveyance to said lands, first above described, free and clear of all incumbrance suffered by, through, or under him, the said Knab, according to the conditions of said bond; yet the said David Knab, whom your orator prays may be made defendant to this bill of complaint, has declined and utterly refuses so to specifically comply with and perform the conditions of said bond on his part, and has declined and utterly refused to execute to your orator said deed of conveyance according to said conditions.

In consideration whereof, your orator prays this honorable court that the said David Knab, the defendant hereto, may be compelled by the decree of this honorable court specifically to perform the conditions of said bond upon his
121 part, first above set forth, and to execute to your orator a deed to the premises in said bond described, according to the terms of said conditions.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may upon his corporal oath and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories hereinafter mentioned, numbered and set forth, as by the note hereunder written, he is required to answer, that is to say:

1st. Whether he did, at the time mentioned hereinbefore in this bill, sign, seal, and deliver to Tertullus D. Butler the bond first above set forth, and whether he did acknowledge the same as hereinbefore stated.

2nd. Whether said bond was not assigned to the complainant at the time, and in the form, as hereinbefore stated, and whether said assignment was not acknowledged by the said Butler as aforesaid.

3d. Whether the said defendant and the said Tertullus D. Butler executed to Joseph Schram the bond last above set forth in this bill, at the time above stated, and whether said bond was not assigned to the complainant at the time and in the form as hereinbefore stated and set forth.

4th. Whether the said Tertullus D. Butler has not satisfied, performed, and discharged the conditions of said last mentioned bond to the satisfaction of the said Joseph Schram and said complainant.

5th. Whether the condition of the bond, first above stated and set forth, has not been performed upon the part of said Tertullus D. Butler and upon
122 the part of the complainant, as assignee of said Butler.

6th. Whether, at the time of the execution of said bond first above set forth, he did own by title of record, or pretended to own, the premises in said bond described.

7th. Whether by the terms and conditions of said bond the complainant is not entitled to a deed for said premises agreeably to the conditions of said bond first above set forth.

8th. Whether this complainant has not frequently requested him to execute said deed to this complainant, and whether he has not neglected or refused so to do.

And may it please this honorable court to grant unto your orator such other and further relief as the justice and equity of the case may require and may seem meet, and also to grant your orator a writ of subpœna, to be issued out of and under the seal of this honorable court, to be directed to the said David Knab, commanding him at a certain day, and under a penalty to be therein limited, personally to be and appear before this honorable court, and then and there full, true, and perfect answers make to all and singular the premises, and especially the foregoing interrogatories, and further to stand to perform and abide such further order and decree therein as to this honorable court shall seem meet, and, as in duty bound, your orator will ever pray, &c.

The said defendant, David Knab, is required to answer the interrogatories numbered, respectively, 1, 2, 3, 4, 5, 6, 7, 8.

JOHN J. ORTON.

H. S. ORTON, *Sol'r for Compl't.*
M. K. ORTON, *of Counsel.*

STATE OF WISCONSIN,
Milwaukee County, ss:

Before me personally appeared John J. Orton, the complainant in the
123 above bill, and made oath in due form of law, that he had read the above bill by him submitted, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

Sworn and subscribed before me this 6th day of August, A. D. 1851.

JNO. G. TOWNSEND,
Notary Public.

In chancery.

The answer of David Knab, defendant, to the bill of complaint of John J. Orton, complainant.

This defendant, reserving to himself all right of exception to the said bill, for answer thereto saith: That some time in the latter part of June, or fore part of July, 1848, Otis Hubbard inquired of this defendant whether this defendant

would be afraid to become security for said Otis, when he should be ready, to the amount of one thousand dollars, in case the said Otis would give this defendant security for so doing to twice that amount, on lots seven and eight, mentioned in said bill, and would pay this defendant well for becoming such security, to which this defendant replied that he would not; that about three weeks afterwards, and some five or six days previous to the twenty-second day of July, 1848, Tertullus D. Butler informed this defendant that the said Otis had sold to Joseph Schram part of lots five and six, mentioned in said bill, for nine hundred and fifty dollars, but that the title to the same was in the names of some persons living east, and that Schram was willing to pay five hundred dollars before the title could be obtained, if the defendant would become security to said Schram for
124 the repayment of the amount which he should pay for said part of said lots five and six, in case the title should not be conveyed to him within a limited time thereafter, and inquired of this defendant whether the said Otis had had any conversation with this defendant in respect to this defendant becoming security for the said Otis to the said Schram, to which this defendant replied, that the said Otis had inquired of this defendant whether this defendant would be afraid to become security for the said Otis to the amount of one thousand dollars, in case this defendant should be well paid for so doing, and secured on lots seven and eight mentioned in said bill; that the said Butler then inquired of this defendant whether this defendant was willing to become such security on the terms before mentioned, to which this defendant replied that he did not know; that the said Butler then urged this defendant to become security for the said Otis, saying the security which he proposes to give you will be ample, referring to said lots seven and eight; you know what the land is worth; I have had the title looked over, and the title is perfect; I will become security with you to Schram, referring to the said Joseph Schram, and he will call on me first; I am worth that amount, referring to the said sum of one thousand dollars, and you cannot be hurt. That, believing the statement of the said Butler in regard to the title to said lots seven and eight, this defendant then consented to become security for the said Otis to the amount above mentioned on those considerations and terms; that the said Butler then said he would get the papers made out in a few days; that about five or six days afterwards the said Butler informed *informed* this defendant that the papers were made out ready for execution; that the defendant and the said Butler then went to the office of Joel W. Hemenway, and as soon as we had entered said office the said Butler delivered to this defendant a paper, saying it was a deed of said lots seven
125 and eight to this defendant, and requesting this defendant to sign two bonds then lying on a table in said office; that this defendant then received the said deed from the said Butler, and signed said bonds then lying on said table, without having read the said bonds, or having heard them read, or having been accurately informed of their contents; that said deed, delivered by said Butler to this defendant at the time of the execution of said bonds, as aforesaid, is a quit-claim deed of said lots seven and eight, except three acres, previously conveyed to , from Cyrus D. Davis and Caroline, his wife, to this defendant in fee; is dated the twentieth day of July, 1848, and is witnessed by said Butler and acknowledged before the said Butler as justice of the peace, and recorded in volume 25 of Deeds, on page 136; that previous to the delivery of the said deed to this defendant, as aforesaid, and after the time this defendant consented to become security for the said Otis Hubbard, as aforesaid, the said Butler had informed this defendant that the manner of giving this defendant security on said lots seven and eight would be by deed; that the title of said lots seven and eight was in the name of the said Davis, and that the deed would come from the said Davis.

And this defendant further answering saith, that he believes that this defendant executed the bond in the said bill first set forth, and, if so, that the said

bond in the said bill first set forth is one of the bonds signed by this defendant in the office of the said Hemenway as aforesaid, and that the execution, acknowledgment, and delivery thereof by this defendant consisted merely in this defendant's signing the same in the office of the said Hemenway as aforesaid, without having read the same, or having heard it read, or having been accurately informed of its contents, and without orally acknowledging the execution
126 thereof, and by immediately leaving said office whilst the said bond in the said bill first set forth was still lying on the table on which it was so signed with the said Butler and the person whom this defendant supposed had drawn the same.

And this defendant further answering saith, that he believes that he and the said Butler executed to the said Joseph Schram the bond in the said bill last set forth; but this defendant, according to the best of his recollection, did not see the said Butler sign the same; and if the said bond in the said bill last set forth was executed by this defendant, it is the other of the bonds signed by this defendant in the office of the said Hemenway, as aforesaid, and it was executed, acknowledged, and delivered by this defendant at the same time and place, and in the same manner in every respect as the said bond in the said bill first set forth, without this defendant having read it or heard it read, or having been accurately informed of its contents.

And this defendant further answering saith, that at the time of the execution of said bonds, as aforesaid, this defendant supposed that one of them bound the defendant to repay the said Schram the amount of purchase money which he should pay for said part of said lots five and six, in case the said Otis Hubbard should not procure from the persons in whose names the title to the same was the necessary powers of attorney, and cause the title to said part of said lots five and six to be vested in the said Schram in three months from that time, and neither the said Hubbard nor the said Butler should repay said Schram the amount of said purchase money which he should pay for said part of said lots five and six, as aforesaid.

And this defendant further answering saith, that at the time of the
127 execution of the said bonds, as aforesaid, he supposed that the other of said bonds obligated this defendant, in case he should be discharged from liability on the bond to Schram, to redeem said lots seven and eight to said Davis, or some other person, for said Otis Hubbard's implied benefit, upon being paid a reasonable compensation for defendant's trouble and loss of time in consequence of becoming such security, as aforesaid.

And this defendant further answering saith, that he never had any conversation, argument, or understanding with the said Butler and Schram, or either of them, by which it was agreed or understood that this defendant was to receive any part of the purchase money for said part of said lots five and six, or that a mortgage for any part of said purchase money was to be executed by said Schram to this defendant and the said Butler, or to this defendant alone. Nor did this defendant ever receive any part of said purchase money, nor of said sum of nine hundred dollars mentioned in said bond in said bill last set forth, and this defendant does not know to whom said purchase money, or any part thereof, was paid by said Schram, nor has this defendant ever heard or been informed whether the said Schram entered into an agreement with the said Butler to execute to the said Butler and this defendant a mortgage, as mentioned in said bond in said bill last set forth; but this defendant believes that the said Schram entered into such agreement with the said Butler; and this defendant has never heard or been informed whether any such mortgage was ever executed by the said Schram, but this defendant believes that the said Schram never executed any such mortgage to the said Butler and this defendant.

And this defendant further answering saith, that in the spring of 1851,
128 he had been informed, and believes it to be true, that the said bond in the

said bill first set forth had been assigned by the said Butler to the said complainant, but this defendant knows nothing in regard to said assignment, the time of making the same, the consideration thereof, or whether the same was acknowledged by the said Butler.

And this defendant further answering saith, that he has never heard or been informed, save by the said complainant's bill, whether the said bond in the said bill last set forth has been assigned by the said Schram to the said complainant; but this defendant believes that the said bond in the said bill last set forth was assigned to the said complainant at the time and in the form stated in said bill.

And this defendant further answering saith, that he has been informed, and believes it to be true, that the condition of the said bond in the said bill last set forth has been wholly or in part performed, or satisfied in substance by a power of attorney of the twenty-eighth of August, 1848, from Lewis F. Hubbard to the said Otis Hubbard, and by deeds of fifteenth of December, 1848, from Emily Hubbard, and of the thirty-first of January, 1849, from Charles F. Bates and Julia Bates, his wife, and of the first of March, 1850, from William Jewell and Emily J. Jewell, his wife, of their respective interests in said part of said lots five and six to the said Otis Hubbard, and by a deed of the fourth of July, 1850, from the said Otis Hubbard and the said Lewis F. Hubbard, by the said Otis Hubbard, his attorney as aforesaid, of their respective interests in said part of said lots five and six to the said Joseph Schram. And this defendant is advised and believes that the condition of the said bond in the said bill last set forth is, in effect, satisfied by the assignment of both of said bonds to the complainant.

129 And this defendant further answering saith, that he has never heard or been informed whether the condition of the said bond in the said bill first set forth has been literally performed by the said Butler, the said complainant, but this defendant believes that the condition thereof has never been performed or satisfied, in whole or in part, so far as relates to the consequence of the title to said part of said lots five and six in any other manner than is hereinbefore stated.

And this defendant further answering saith, that at the time of the execution of the said bonds this defendant believed that the legal title to said lots seven and eight, except said three acres, was vested in him by the delivery of the said deed from said Davis and wife to this defendant, as aforesaid; but this defendant has never pretended to have any interest in said lots seven and eight other than was vested in him by said deed from said Davis and wife to this defendant.

And this defendant further answering saith, that the said Butler did not at any time enter into any treaty with this defendant for the absolute purchase of said lots seven and eight, or any part thereof, or any interest therein, and that this defendant never entered into any verbal agreement with the said Butler for the sale or conveyance of said lots seven and eight, or any part thereof, or any interest therein, to the said Butler, and that this defendant never entered into any written agreement with said Butler in relation to said lots seven and eight other than the bond in the said bill first set forth, executed and delivered by this defendant, as hereinbefore stated.

And this defendant further answering saith, that the said complainant requested this defendant to execute a deed of said lots seven and eight
130 to the said complainant, which this defendant declined to do, as the said Otis Hubbard had forbid this defendant from so doing; that the said Otis Hubbard has since commenced a suit in this honorable court against this defendant, the said Butler, and the said complainant, to compel this defendant to convey said lots seven and eight to the said Otis Hubbard, in which this defendant has been enjoined from conveying said lots seven and eight until the further order of this court.

And this defendant further answering saith, that he is unable to state

whether the said complainant is entitled to a deed for said lots seven and eight by virtue of the said bond in the said bill first set forth, and therefore desires to submit that question to the decision of this honorable court; and in order that the said Otis Hubbard and Tertullus D. Butler may be bound by the decree of the court in this cause, this defendant prays that the said Otis Hubbard and Tertullus D. Butler may be made parties hereto.

And this defendant further answering saith, that he is ready and willing, and hereby offers, to convey said lots seven and eight, except said three acres, to whomsoever this honorable court shall deem entitled to the same, upon the cancellation of said bond in the said bill first set forth, and upon such terms as to compensation, cost, and expenses as this honorable court shall deem just.

DAVID KNAB.

W. W. GRAHAM,
Sol., and of Counsel for Def't.

STATE OF WISCONSIN,
County and city of Milwaukee, ss:

On the 15th day of September, 1857, before me personally appeared the above-named David Knab, and made oath that he has heard read the
131 above answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and as to those matters he believes it to be true.

JOHN F. SMITH,
Notary Public.

Milwaukee circuit court, February term, 1852.—In chancery.

JOHN J. ORTON
vs.
DAVID KNAB.

The replication of J. J. Orton, complainant, to the answer of David Knab, defendant.

This repliant, saving and reserving to himself all and all manner of advantage or exception which may be had and taken to the errors, and uncertainties, and insufficiencies of the answer of the said defendant, for replication thereto saith: that he doth and will aver, and maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer is very uncertain, evasive, and insufficient in the law to be replied to by this repliant without that; that any other matter or thing in said answer contained material or effectual in law to be replied unto, and herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matter and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

H. H. ORTON,
Sol. for Compl't.

132 Milwaukee circuit court.—In chancery.

JOHN J. ORTON
vs.
DAVID KNAB.

Testimony on the part of the complainant taken before H. W. Tenney, court commissioner of Mil. co., on the 9th of November, A. D. 1853. E. Mariner, esq., appearing for compl't, and J. S. Brown, esq., for def't.

John A. Messenger, being first duly sworn, deposes and says as follows:

I was acquainted with the late Otis Hubbard. I have known him from the winter of 1836–'7 to the time of his death.

Ques. Do you know what his pecuniary circumstances were during that time?

(Objected to as irrelevant.)

Ans. The most I know about it is from his own statements. He has told me at different times that he left his business matters very much embarrassed at Rochester, N. Y. When he came here he bought land in the name of J. K. Bottsford, of Chicago, and in the name of H. M. Hubbard, of Milwaukee. I have known of this property having been changed from the names of the above persons to those of others by procuring deeds from them. I have made out a great many of the deeds myself. I learned, from his own statements, that he received the money when sales were made, and I know that he negotiated the sales himself. I do not know as I know who else held property for him, unless myself, if I did so.

It seems to me, but I am not positive, that he deeded to me lots 7 and 8, sec. 9, t. 7, r. 22. I learned from him that the reason why he held property in other people's names was because there were large claims against
133 him at the east, in Rochester, which were in judgment partly, on which anything he might hold here in his own name was liable to be taken. He always claimed that those judgments were unjust. He said, also, that he had money enough on deposit in the Boston banks, but they could not get that.

Cross-ex.

I cannot recollect certainly to whom I deeded lots 7 and 8, above mentioned. If I deeded them to Mr. Davis it was at the request of Otis Hubbard, in consideration of Hubbard's giving up certain notes to me which had been given by me to Otis Hubbard in part for the same property.

Direct resumed.

Ques. When Hubbard conveyed you that land was it an absolute sale?

Ans. I felt in honor bound from the transaction to deed him back the land whenever he requested me to, and surrendered the notes. If anybody else should have presented the notes for payment, I should have considered myself released from any obligation to Hubbard about the land. I think I got this title from Otis Hubbard.

(The above testimony is all objected to for irrelevancy.)

J. A. MESSENGER.

Subscribed and sworn to before me this 9th of November, A. D. 1853.

H. W. TENNEY,
Court Com'r.

Sylvester Pettibone, being duly sworn, deposes and says as follows:

I was acquainted with the late Otis Hubbard from the winter of 1835 and '36 up to the time of his death. I do not know of his owning any
134 land in Milwaukee county in his own name during that time. (Objected to as irrelevant.) I know of his claiming to own property, the title to which was in other persons' names. I have heard him say, as a reason why he held property in this way, that he was considerably involved in Rochester when he came here. I rented a lot and blacksmith shop of him. The lease was made in Bottsford's name. I asked him why the lease was made from Bottsford. His reply was to the effect that there were large debts against him in Rochester, and it was necessary for him to hold his property in this way to protect it.

This was in the spring of 1836. Five or six years afterwards I heard him repeat about the same thing.

(The above was all duly objected to as irrelevant.)

SYLVESTER PETTIBONE.

Subscribed and sworn to before me this 9th of November, 1853.

H. W. TENNEY,
Court Com'r.

Tertullus D. Butler, being first duly sworn, deposes and says:

(Def'ts object to this witness as being interested, being assignor of the land and obligee therein.)

Question. Did you ever own lots 7 and 8, in sec 9, town. 7, r. 22?

Answer. I suppose I did own them. There was a bond given by myself, in conjunction with David Knab, and in consideration of said Knab's joining me in the bond, by my direction a deed of the above-described lots was put into Knab's hands as collateral security for the fulfilment of the conditions of said bond. When the condition was fulfilled, Knab was to deed the property to me.

135 (Def'ts object to all parol statements contained in the answer of the witness of the contents of any paper executed to him, and of any parol contract or understanding existing as to the title of this land.)

[The lands above referred to are the same mentioned in the bill. This is admitted by the parties.]

Ques. What did you do with your interest in that land?

Ans. I disposed of it to John J. Orton.

Ques. Have you ever been paid for it?

Ans. I have.

Ques. When did you get your title to the land?

(Def't objects to any parol testimony as to the title acquired.)

Ans. I got it through Otis Hubbard by virtue of a certain bond.

Ques. Who executed that bond? Who were the parties to it?

Ans. David Knab and myself.

Ques. Who was it executed to?

Ans. To one Schram.

Ques. Have you got that correct?

Ans. I believe I have.

Ques. Which bond do you claim title under?

Ans. The bond from David Knab to myself.

Ques. Was that bond from Mr. Knab to you executed with the knowledge of Mr. Hubbard?

Ans. It was, and by his special directions.

Ques. When executed and delivered, whose property was the bond?

Ans. It was mine.

Ques. Had Mr. Knab been informed of the terms and conditions of that bond before signing it?

Ans. He had. He knew all about it.

136 Ques. Who did you pay for the land and the interest in the land conveyed in the bond?

Ans. I paid Otis Hubbard.

Ques. Do you know whether Mr. Davis held the title to this land once?

Ans. He did.

Ques. Do you know from whom he held it?

Ans. He held it for Otis Hubbard.

Ques. Do you know to whom he conveyed it?

Ans. He conveyed it to Knab under Otis Hubbard's direction.

Ques. Did you ever hear the directions given by Mr. Hubbard to Mr. Davis for the conveyance of this land?

Ans. Not personally when Hubbard and Davis were present, but Hubbard told me that he had directed Mr. Davis to execute the deed according to the understanding, and that he had requested him to deliver it to me when I called for it, which he finally did.

(Def't objects to any conversation between Hubbard and witness for the purpose of showing title in witness.)

Adj'd to 2 o'clock p. m.

2 O'CLOCK P. M.

The parties again appeared, and the examination proceeded as follows:

Ques. How long had you known Mr. Hubbard before he died?

Ans. Between 9 and 10 years.

Ques. Do you know whether during that time he was pecuniarily embarrassed?

Ans. He was.

Ques. To what extent?

(Objected to as irrelevant.)

137 Ans. I should judge to a considerable extent, but have no means of judging, except from his method of doing business.

Ques. How long did it continue?

Ans. I believe it continued till the time of his death.

Cross-ex.

You have stated that you paid Otis Hubbard for the land in dispute. State how much you paid.

(Objected to as irrelevant and impertinent.)

Ans. I boarded the old gentleman for four or five years. I furnished him with some merchandise, and let him have some money. There was a running account between us. Agreeable to that account he would have owed me one thousand dollars, but under the extraordinary circumstances he owed me over $2,000.

How much money did you let him have in all?

Ans. I had an account running with him for from 4 to 6 years without a settlement. I should think that during that time I let him have $500 or $1,000 in cash, but he had let me have some also.

When did these five or six years commence, and when end?

Ans. I should think from 1844 or 1845 to 1849 or 1850.

When did you make the arrangement by which you were to have the land in question?

Ans It had been talked about some time previous to the date of the bond, perhaps a year and a half, not perhaps in relation to this particular property, but some property.

When was it definitely arranged between you that you were to have the specific land in question?

Ans. When the bond was executed from David Knab to me.

At the time the bond was given, did you pay any money to Hubbard?

138 Ans. I do not know that I did at that particular time.

Did you pay any part of the consideration mentioned, and subsequently to the giving of the bond?

Ans. I think not.

How long prior to the date of the bond was the last payment in money made by you.

Ans. There was a payment of $80 I made him at one time, which I think was made about a week before, but am not sure.

How much was that payment, and who was present, and did you take a receipt?

Ans. $80. I think no one was present. I did not take a receipt.

Was the account of yours alluded to as running for so many years entered upon a book, and what vouchers have you for the same?

Ans. It was entered upon a book, but whether any vouchers are now in my possession is very questionable. After the death of my wife, and about two years ago, and a year before I missed my books, and have not been able to find what became of them.

In whose possession, and where do you believe these books are now, and who took them?

Ans. I cannot answer. They were important to the heirs of my wife's estate, but whether they had anything to do with it, I do not know.

Had you any other vouchers except said books?

Ans. I think not. I may possibly have some orders on me for money from Otis Hubbard.

Will you look for such orders, and produce them to the commissioner, Tenney?

Ans. I will look, and if I find them I will do so.

Who was present when you and O. Hubbard made the arrangement alluded to?

Ans. No person.

139 Did Otis Hubbard direct Knab to give the bond to you alluded to above.

Ans. He did.

Did you and said Knab talk the matter over, so that Knab fully understood the contents of the bond running to you?

Ans. We did.

Were there charges in your books against said Hubbard for board, and at what rate per week?

Ans. There were, at the rate of $2 50, $3, and $3 50 per week; also there were charges for rent of room.

What was the amount, and what the nature of the merchandise you let Hubbard have?

Ans. Tobacco, liquors, groceries, tea, sugar, coffee.

How did said Hubbard use the tea, sugar, and coffee?

Ans. I cannot say. Sometimes he had men at work whom he furnished. Sometimes for men employed by his nephew. I cannot state the amount of the merchandise separately.

Did you draw the deed, and take the acknowledgment from Davis and wife to Knab?

Ans. I did not draw the deed, but think I took the acknowledgment.

(This answer objected to.)

Whose lots were those mentioned in the bond to Schram, and for whose benefit were they sold to Schram?

Ans. They were Otis Hubbard's lots, and were sold for his benefit.

At about the time of the date of the bond, were you in the grocery business?

Ans. No, sir; I was in the manufacture of cigars and tobacco, but I was in the way of procuring groceries, and always did when he wanted them. I had been in the grocery business previously, during part of the years 1844 and 1845.

Subsequently to 1844–'5, were you in embarrassed circumstances?

Ans. I was not.

140 What was the extent of your property from 1844 to the date of the bond?

(Objected to by compl'ts.)

Ans. I was out of debt, but had not much property. I had more than enough to pay my debts always, but I had not enough to carry on the business I was in without some embarrassment. I do not think I was then worth $1,000.

Did you immediately after giving up the grocery business commence the tobacco business?

Ans. It may have been from 4 to 6 months before I did so.

How long after the date of the bond did you cease paying your debts, and give up the tobacco business?

Ans. About a year and a half after.

When did you assign the bond to the complainant?

Ans. At the date of the assignment on the back of the bond.

How much did complainant pay you for the same?

Ans. The consideration was $2,100.

When and how did he pay you?

(Under objection.)

Ans. He paid me at that time, I think, about $800 in cash. Subsequently $300, and again about $200, I think. He also at that time agreed to release me from certain liabilities.

What liabilities did he agree to release you from?

Ans. I cannot really state positively. There was one in relation to a Schram bond. Another, that was due to Judge Paine, of $120; also some minor obligations to some individuals, probably not for over $100 more.

Was the amount due to Judge Paine a judgment recovered by said Paine as attorney *vs.* Otis Hubbard, in favor of McDougal?

Ans. I think it was.

Why and how were you bound to pay it?

Ans. It appears to me it was on account of the Schram bond.

141 Did you take any writing from complainant to the effect that he would pay or release those liabilities, or to any other effect?

Ans. I did not. I think not. I regarded it as essential to his own security to do it as to my own.

Did you receive any other moneys from the complainant besides those above set forth, or anything else besides those moneys, and the agreement to release as aforesaid?

Ans. I think there was $50 in money that I had after the execution of the transfer to Mr. Orton.

Did this assignment take place before or after you were broken up in business?

Ans. After.

What did you do with the money received from complainant.

Ans. I spent it.

At the time you executed the assignment or made your arrangements with

the complainant, did you obtain in his presence any other title to the premises than that through the land assigned?

Ans. I did not.

Did you state to said complainant any other title in your arrangement above set forth by you with Hubbard?

(Objected to.)

Ans. I certainly gave Mr. Orton to understand at that time that I had an arrangement with Mr. Hubbard and how it came about. I think I did, but am not positive. On reflection, I think I did not. I am confident I stated to Mr. Orton that the moment the bond given by Mr. Knab and myself to Schram was complied with, he would execute a deed of the land agreeably to the terms of his bond, either to myself or another, as I might direct.

At the time when the bond was executed by Knab, was Hubbard generally under the influence of liquor?

142 Ans. He generally was in the habit of drinking, but he never would transact any business when under the influence of liquor. He was perfectly sober when the bond was executed.

Who was present when you received the money from complainant, or made your arrangement with him?

Ans. I think his brother was in the office, but don't know as he knew anything about the transaction. Mr. Beverung, I think, was present.

Did both of the witnesses to the assignment sign at the same time?

Ans. I believe they did.

Was the money paid at the time of the witnessing of the assignment?

Ans. I think it was, that is, the largest sum—the $800. The $300 was paid in about three months after. The $200 about two months later still, and the remaining $50 in about a year after.

After the bond assigned by you was written, was it read over to Knab, or did Knab read it?

Ans. It was read over to Mr. Knab.

Have you filed an answer to a bill in chancery, in which you have given any different account of the matters about which you here testify from that now given by you?

Ans. I do not think I have given any different account. I have filed an answer in chancery.

Direct resumed.

What did you mean when you said extraordinary circumstances?

Ans. I spoke of the extraordinary trouble of taking care of a man of Mr. Hubbard's habits and character. He was in the habit of getting drunk, and made a great deal of trouble. I was frequently called from my

143 business to protect my family from his violent and obstreperous conduct.

Was the amount paid Hubbard by you received by him as a full payment for his interest in the lands described in said bond executed by Knab?

Ans. It was; with other considerations connected with his residence with me in my family.

Who was to perform the condition of the bond to Schram?

Ans. David Knab and myself. I was the principal and he surety.

Were you doing a fair business during the period that Hubbard lived with you up to the time of the execution of the bond?

Ans. I was.

When you first spoke to Mr. Orton about the sale of said lots, did you agree to give a deed?

Ans. I agreed to procure him a deed.

Was there anything said about a bond at that time?

Ans. I think not.

What was the bargain first made for—the land or the bond?

Ans. The land; and gave him the bond to carry out the sale.

Did you not represent to complainant that you owned the whole interest in said lands, and that no other person had any claim thereto; and was any mention made of Hubbard's having any claim or anything to do to said premises until after the commencement of this suit? What did you say to Orton about Hubbard having any interest in those premises before the commencement of this suit?

Ans. I represented to him that no person had any claim on the property but myself; that I knew of none.

You stated in your cross-examination that you told the complainant of your relations with Hubbard in regard to these lands. Was that before or after the commencement of the suit of Otis Hubbard *vs.* Orton, Knab and Butler?

144 Ans. I think it was after.

Did you, previous to the commencement of the last mentioned suit, ever tell Orton that Hubbard ever claimed to have any interest in said premises?

Ans. I never did.

Was the obligation to fulfil the bond to Schram for Hubbard's benefit, and was he the party interested in having the conditions of that bond fulfilled?

Ans. It was; and he was.

Did you expend any money or time in fulfilling the condition of the bond to Schram; and how much?

Ans. I did both; about $120 in money and time worth $30. The $120 was spent in going to Rochester to procure releases in order to comply with the bond to Schram.

Adj'd to 2 o'clock p. m. of Nov. 10, 1853.

NOVEMBER 10TH, 2 *o'clock p. m.*

The parties again appeared, and the examination of Mr. Butler proceeded as follows:

Cross-examination.

Did you change the nature and terms of your bargain after you first made it with complainant?

Ans. I did not.

Did the complainant ask you how you acquired title, or the nature of it, or complain of the nature of your title?

Ans. He did not.

You say that you told him you were the owner of the land. Did complainant at any time ask how you became so, or did the matter pass without remark?

Ans. He asked how I became so.

Did you then tell him how you became so as you have stated it, or did you tell him a different story?

(Objected to.)

145 Ans. I told him I got it through Otis Hubbard; that is, I told him so after the commencement of the suit.

You stated, in your reply to a question from the defendant, that you disclosed to complainant the fact of deriving title through Hubbard. You afterwards, in reply to a question from complainant, intimated a doubt as to that. Did you, in the mean time, hear complainant state that you did not tell him?

(Objected to.)

Ans. I do not recollect of having intimated that I had told Orton, prior to the closing of the sale, that I did derive title through Hubbard. I did not hear Orton make any such statement.

Have you, since the commencement of this suit, received any money from the complainant?

Ans. I have.

How much did you receive?

(Objected to.)

Ans. Fifty dollars I borrowed of him and gave security for it. I borrowed it of him, and had hard work to get it, too.

Have you received any other money from complainant since the commencement of this suit?

Ans. I have not.

What, if any, directions did you give for the conveyance of land to Knab, to whom was the directions given, and what were the words?

Ans. It is so long ago that I do not recollect distinctly. Otis Hubbard gave the directions to Davis according to my agreement with Mr. Hubbard. I do not know the words.

Were you present when Hubbard gave the directions to Davis?

Ans. I was not. I think, however, that I subsequently saw Hubbard and Davis, and Hubbard stated to Davis that I would call and take an acknowledgment of the deed.

146 At the time you executed the assignment to complainant, did you take from him any paper or instrument in writing?

Ans. I did not.

Did you have any one as witness of the terms of the arrangement between you; and if so, whom?

Ans. There was no one, to my knowledge.

Was the complainant at that time a practicing lawyer?

Ans. I am not informed whether he was or not.

Have you seen your answer filed in case of Hubbard vs. yourself, Orton, and Knab since the same was filed, or a copy of it?

Ans. I have not.

Were you yesterday in the office of the complainant, and how long?

Ans. I was last evening. I was also in the morning of yesterday. I was there with Mr. Pettibone, perhaps half an hour.

Was Mr. Pettibone there the whole time you were?

Ans. He was.

Did you receive from Schram any portion of the purchase money of the lots conveyed by Hubbard to him?

Ans. I had a portion of it—perhaps $200—possibly more—which was paid to me after the signing of the bonds, which I held in trust for Mr. Hubbard, and paid over to him as he wanted it. I paid it all over very soon. I had received, before the execution of the bond, $200 or $300 from Schram, which I used for a while and then paid over to Hubbard.

Did you fail to get the title to the lots perfected when you went to Rochester?

Ans. I accomplished all I went to Rochester to effect, but whether it perfected the title or not I do not know.

Direct resumed.

147 Do you recollect the suit of Otis Hubbard vs. yourself, J. J. Orton, and David Knab?

Ans. I do.

Do you recollect Mr. Orton asking you anything at that time of Hubbard's right or title to the lands in question to found such a suit upon?

Ans I think Mr. Orton did ask me about Hubbard's right, and I told him he had no right.

(Objected to.)

Was not that the first time you ever mentioned to Orton Hubbard's having or claiming to have any title to the lands in question?

(Objected to as leading.)

Had you before that time told Orton of Hubbard's having or claiming any title to the lands in question?

(Objected to as leading.)

Ans. I think not.

What had you told Orton about Hubbard's having or claiming to have title or interest in or to the lands in question previous to the time of the commencement of said suit?

Ans. I did not tell him anything.

Did he, that you know, have any knowledge of any title to the lands in question, save the title of record, previous to that time?

Ans. He did not, to my knowledge.

Do you know whether he made out an abstract of the title to said lands previous to the purchase?

Ans. I believe he did.

In your cross-examination you said you told Orton that you derived title through Otis Hubbard. When did you tell him so?

Ans. Subsequent to the commencement of the suit above referred to.

148 Was not the fifty dollars which you say you have received from Orton since the commencement of this suit the same fifty that you said you received of Orton in your previous testimony?

Ans. It was; it was not properly mentioned previously. It was not part of the consideration of the assignment of the bonds, but borrowed money.

The above testimony, called out by the defendant, was all taken subject to the objection on the part of complainant.

T. D. BUTLER.

Subscribed and sworn to before me this 10th day of November, 1853.

H. W. TENNEY,
Court Com., Mil. co.

EXHIBIT A.

Copy release exhibited to witness, T. D. Butler, before taking testimony, and filed with the testimony in this suit.

"For value received I hereby release T. D. Butler from all liability by reason of any covenants or agreements in any deed or obligation of or concerning lots 7 and 8, in sec. 9, town. 7, range 22, Milwaukee county, Wis.

"Witness my hand and seal this 9th day of November, A. D. 1853.

(Signed) "J. J. ORTON." [SEAL.]

The above is a copy of a paper given by J. J. Orton to T. D. Butler and shown to J. S. Brown, defendant's attorney, before testifying in the above suit, having been compared with the original by me.

H. W. TENNEY.

Nov. 10, 1853.

149 STATE OF WISCONSIN,
Milwaukee county, ss:

I, Henry W. Tenney, court commissioner in and for said county, do certify that the above depositions of John A. Messenger, Sylvester Pettibone, and Tertullus D. Butler, were taken before me, at my office, in the city of Milwaukee, in said county, on the 9th day of November, A. D. 1853, commencing at 10 o'clock a. m., and thereafter as above stated.

That they were taken at the request of the complainant upon verbal interrogatories, and the answers reduced to writing by myself. That they were taken to be used in the suit of John J. Orton *vs.* David Knab, now pending in the circuit court of said Milwaukee county in pursuance of consent of parties. That both parties attended at the taking of said depositions by their solicitors, E Mariner, esq., for compl't, and J. S. Brown, esq., for def't. That said deponents, before examination, were sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause, and that said depositions were carefully read over to said deponents, respectively, and then subscribed by them.

Dated November 11, 1853.

Fees, $9 50.

H. W. TENNEY,
Court Commissioner, Milwaukee Co., Wis.

Milwaukee circuit court.

JOHN J. ORTON
vs.
DAVID KNAB.

Testimony of defendant taken before H. W. Tenney, court com'r, on the 20th day of October, 1853, at 10 o'clock a. m.—J. S. Brown appearing for def't W. P. Lynde for compl't.

150 Cyrus D. Davis, being first duly sworn, deposes and says as follows:

I was acquainted with Mr. Otis Hubbard in his lifetime. I recollect of executing a deed of some land upon the Milwaukee river to David Knab. I held the legal title in the land for the benefit of Otis Hubbard. I received the deed of it from Mr. Messenger. I afterwards deeded it to Mr. Knab at the request of Otis Hubbard. I received nothing from Mr. Knab as payment, as far as I recollect.

CYRUS D. DAVIS.

Subscribed and sworn to before me this 20th of October, 1853.
H. W. TENNEY, *Court Com.*

Joseph Schram, being duly sworn, deposes and says, as follows:

I was acquainted with Otis Hubbard in his lifetime. I am also acquainted with T. D. Butler and David Knab. I once received a bond for the conveyance of some lots in Milwaukee by Otis Hubbard from David Knab and T. D. Butler. It was the only bond I ever received from Knab and Butler, and is on record. I received a conveyance for the lots mentioned in the bond between one and two years after the date of the bond. All the deeds I received are on record.

Question. What was done towards the fulfilment of the conditions of the bond besides what appears on record?

Answer. I do not know that anything was done after the three months from the date of the bond. I asked from Hubbard, and from Butler and Knab, several times, for a compliance with the conditions of the bond. I purchased the lots of Hubbard. I paid the consideration money to Mr. But-

ler. I know that Hubbard took a part of it. I had the bond in my possession, and also deeds of the above lots. Mr. Knab asked me for the
151 bond, but I refused to give it up, not considering the title clear. Mr. Orton came to me and asked if I would assign the bond to him, if he would clear the title to the property. I told him if he would clear the title I would assign the bond to him, because Knab had never done it, and I did not expect he ever would. (This answer is objected to, it appearing that the assignment was in writing.) I then assigned the bond to Mr. Orton in writing on the back of the bond, and gave it to Mr. Orton. I once put the bond in the hands of my attorneys to have legal proceedings commenced on it, to compel a compliance with its conditions, but afterwards concluded not to have suit commenced.

J. B. SCHRAM.

Subscribed and sworn to before me this 20th day of October, A. D. 1853.

H. W. TENNEY,
Court Com'r.

Cyrus D. Davis, being recalled by complainant, deposes and says, as follows:

The way I came to hold the bond above referred to for the benefit of Otis Hubbard was this: Mr. Hubbard and Mr. Messenger had some unsettled accounts between them, and some notes given by Messenger to Hubbard were put in my hands for collection. I gave the notes to Mr. Upham to collect. He sued Messenger in my name. (This testimony is objected to as irrelevant.) I had a bill of sale of the notes properly receipted. I do not know whether they belonged to me or not. I could call them mine or not, just as I pleased. I do not recollect whether I had paid any consideration for the notes. We had considerable deal together.

Quest. Did you hold these notes and this property of Otis Hubbard as a cover to keep it away from his creditors?

(Objected to as irrelevant.)

Answer. I do not know whether I did or not. I do not know that
152 Otis Hubbard was insolvent at that time. I considered him rich. But I do not know whether anything could be collected of him. I did not hold any other property for Otis Hubbard except the lands and notes above spoken of. I do not know as I can tell how I came to hold the property for Hubbard. It is a long time ago, and I do not remember the transactions distinctly.

At the time Mr. Hubbard spoke about transferring the property to Mr. Knab, he came into the office with Mr. Butler, and wanted I should quit-claim to Mr. Knab. I think Mr. Butler made out the deed, and I signed it. Mr. Butler appeared to me acting for Mr. Hubbard, and made out the deed at his request. Mr. Butler was then a justice of the peace. I *then* I delivered the deed to Mr. Butler at Hubbard's request. That Mr. Butler brought the deed over to my house and I signed it, and he took it away with him. I afterwards, about the time I settled with the administrator of Mr. Hubbard, at the request of Mr. Lapham, I executed a deed of the same land to George Smith. No consideration passed to me for it, and I do not know of any passing to any one. Mr. Lapham said there was likely to be some trouble about it. I had heard that there was a lawsuit then pending about it.

CYRUS D. DAVIS.

Subscribed and sworn to before me the 20th day of October, 1853.

H. W. TENNEY,
Court Com'r.

STATE OF WISCONSIN,
Milwaukee, ss:

To CYRUS D. DAVIS and JOSEPH SCHRAM:

In the name of the State of Wisconsin, you are hereby required to appear before the undersigned, one of the court commissioners in and for
153 said county, at my office, on the 20th day of October, 1853, at 10 o'clock in the forenoon of said day, to give evidence in a certain case then and there to be tried, between John J. Orton, complainant, and David Knab, defendant, on the part of the complainant.

Given under my hand at Milwaukee this 19th day of October, 1853.

H. W. TENNEY,
Court Com'r, Wis.

MILWAUKEE COUNTY, *ss:*

I hereby certify that I personally served the within subpœna on the within named Joseph Schram by reading the same to him; also paying him his fees. I also certify that I read the same to Cyrus D. Davis; his fees tendered and refused.

Dated October 19, 1853.

Sheriff's fees, $1 50.

H. L. PAGE, *Sheriff,*
By JOHN MITCHELL, *Dep't.*

STATE OF WISCONSIN,
Milwaukee County, ss:

I, Henry W. Tenney, court commissioner in and for said county, do certify that the above deposition of Cyrus D. Davis and Joseph Schram were taken before me, at my office in the city of Milwaukee, in said county, on the 20th day of October, A. D. 1853, commencing at 10 o'clock a. m.; that they were taken at the request of the defendant, and Mr. Davis was also examined on part of compl't upon verbal interrogatories, and reduced to writing by myself; that they were taken to be used in the suit of John J. Orton *vs.* David Knab, now pending in the circuit court of said Milwaukee county in pursuance of an order of said court; that both parties attended at the taking of said depositions by their solicitors, J. S. Brown, esq., for defendant, and Wm. P. Lynde for complainant; that said deponents, before examination, were sworn to testify the truth, the whole truth, and
154 nothing but the truth, relative to said cause; and that said depositions were carefully read over to said deponents, respectively, and then subscribed by them.

Dated Oct. 20, 1853.

H. W. TENNEY,
Court Commissioner, Milwaukee Co., Wis.

Circuit court, Mil. Co.

JOHN J. ORTON
vs.
DAVID KNAB. } In equity.

J. A. Lapham, of Milwaukee, produced, and being duly affirmed according to law as a witness on the part of the defendant, deposes and says, that he has been administrator of the estate of Otis Hubbard, deceased, but is not now. Question.—Have you in your hands here in court 8 notes purporting to be given by T. D. Butler to Otis Hubbard? (Objected to as irrelevant.

Admitted and exception noted.) Answer.—I have. Witness produces notes; says, that he is acquainted with the handwriting of T. D. Butler, and the signature to each of said notes is the genuine signature of T. D. Butler. (Notes left with clerk, in envelope marked A.)

J. A. LAPHAM.

Taken in open court this 19th Nov'r, 1853, before me.

LEVI HUBBELL.

Milwaukee circuit court.

JOHN J. ORTON } In equity.
vs.
DAVID KNAB. }

SPECIAL TERM, *Dec.* 22, 1853.

Present, Hon. Levi Hubbell, circuit judge.

And now, at this day, the court being well and sufficiently ad-
155 vised of and concerning said cause, it is ordered and adjudged that the bill filed in this cause be, and the same is hereby, dismissed for want of parties without prejudice, with costs to be taxed.

SPECIAL TERM, *January* 19, 1854.

And now comes the said John J. Orton, complainant in the above entitled cause, who, thinking himself aggrieved by a certain decree made therein on the 22d day of December, A. D. 1853, by which the bill therein was dismissed, doth appeal therefrom to the supreme court of the State of Wisconsin.

E. MARINER,
Solicitor for Compl't.

Same day.—Let the bond be given by the appellant in the foregoing case be executed in the penalty of two hundred and fifty dollars, with sureties justifying according to the statute.

Dated Jan'y 19, 1854.

LEVI HUBBELL, *Judge, &c.*

January 20, 1854.—Bond on appeal filed, with J. J. Orton as principal, and Ephraim Mariner as surety.

February 6, 1854.—Record made up and mailed to clerk of supreme court.

Be it remembered that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, on the twelfth day of December, A. D. 1854, on the 100th day of the term, to wit, on the twenty-third day of April, A. D. 1855: present, the Hon. Edward V. Whiton, chief justice, and the Hon. Abraham D. Smith and the Hon. Samuel Crawford, associate justices of said court, the following proceedings were had, *inter alia*, to wit:

156 Appeal from circuit court of Milwaukee county, State of Wisconsin

JOHN J. ORTON, *appellant,* }
vs.
DAVID KNAB, *appellee.* }

On reading and filing the report of Henry L. Palmer, esq., a special commissioner appointed by this court to take conveyance of the premises de-

scribed in the final decree in this cause, of the making of such conveyance according to the directions of said decree, and on motion of E. Mariner, esq., the solicitor of the said complainant, it is ordered that the same be, and is hereby, confirmed.

Dated in open court, in Madison, this 19th day of March, A. D. 1855.

By the court:

EDWARD V. WHITON,
Chief Justice.

STATE OF WISCONSIN,
Supreme Court, ss:

I, Lafayette Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true copy of the order of the court in the above-entitled cause, as appears of record.

In testimony whereof, I have hereunto set my hand and affixed
[L. S.] the seal of said court, at Madison, this tenth day of September, A. D. 1861.

LAFAYETTE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

157 State of Wisconsin, circuit court, Milwaukee county.

JOHN J. ORTON
vs.
DAVID KNAB.

I, D. McDonald, clerk of said court, do hereby certify that I have compared the foregoing with the original bill, answer, replication, depositions of witnesses, decree of court dismissing bill, appeal of complainant from said order, and certified copy of order of confirmation of supreme court, on file in the above-entitled cause; that it is a correct transcript therefrom and of the whole thereof as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed
[SEAL] the seal of said court this 11th day of September, A. D. 1863.

[U. S. revenue stamp, 5 cts.] D. McDONALD, *Clerk.*

158 *Record from circuit court of Mil. Co. in Hubbard vs. Knab et als.*

Pleas before the honorable Levi Hubbell, judge of the second judicial circuit of the State of Wisconsin, and presiding judge of the circuit court in and for the county of Milwaukee, at a term of said court, begun and holden at the court-house, in the city of Milwaukee, on the third Monday of September, in the year of our Lord one thousand eight hundred and fifty-one.

HENRY K. WHITE, *Clerk.*
JOHN WHITE, *Sheriff.*

OTIS HUBBARD
vs.
DAVID KNAB, TERTULLUS D. BUTLER, and JOHN J. ORTON.

Be it remembered that heretofore, to wit, on the 5th day of August, A. D. 1851, comes the said complainant by his solicitor, Charles E. Jenkins, and filed in the office of the clerk of the circuit court aforesaid his certain bill of complaint, in the words and figures following, to wit:

In chancery.

STATE OF WISCONSIN.

To the circuit court of Milwaukee county:

Your orator, Otis Hubbard, a citizen of the State of Wisconsin, and a resident of the city and county of Milwaukee, in said State, exhibits this his bill of complaint against David Knab and John J. Orton, citizens of the same State, and residents in the said city, and Tertullus D. Butler,
159 also a citizen of the same State, and a resident of Menasha, in the county of Winnebago, in the said State, and complainant shows that in the month of July, 1848, Cyrus D. Davis, of Milwaukee, held and owned in trust for your orator, and subject to be conveyed and disposed of as your orator might direct, all those certain tracts or parcels of land lying in the county of Milwaukie and State of Wisconsin, known as lots seven and eight of section nine, in township number seven north, and range twenty-two east, containing $74\frac{67}{100}$ acres, except therefrom three acres of said tract of land theretofore sold by said Cyrus D. Davis.

That shortly previous to that time your orator, for the purpose of raising money to assist the said Tertullus D. Butler in his business, had sold to one Joseph Schram, also of Milwaukee, a part of lots 5 and 6, in block 43, in the second ward of Milwaukee, but being unable at that time to convey to the said Schram a clear and perfect title to the said premises, the said Tertullus D. Butler and the said David Knab executed to the said Joseph Shcram a bond, whereby the said Butler and the said Knab bound themselves, their heirs, executors, and administrators, in substance to procure from the proper persons a deed of conveyance of said premises to said Schram, and free and clear the same from all incumbrances whatsoever.

That your orator, in order to secure the said David Knab against all damages which might accrue against him by reason of the liability which he, the said Knab, had incurred by the execution of the said bond with the said Butler to the said Joseph Schram, and at the request of the said Knab, who was anxious to be secured in some manner, directed the said Cyrus D. Davis to convey to the said Knab the said tracts of land known
160 as lots seven and eight in section nine, town. seven and range twenty-two. That the said Davis, in compliance with the said request of your orator, did convey the said tracts above mentioned to the said Knab, and that the said Knab received and held the said tracts of land as security against all damages, costs, and charges which might accrue against him, or be incurred by him by reason of his executing the bond aforesaid to the said Schram, and for that purpose alone, and none other whatever; and that the said Knab held the same in trust for your orator, subject to be conveyed to your orator whenever the said Knab should be relieved from liability on the bond so as aforesaid executed by him and the said Butler to the said Schram.

And your orator further states that he is informed and believes that at or about that time, or soon afterwards, the said David Knab executed to the said Tertullus D. Butler a bond in the penal sum of two thousand dollars, whereby the said Knab bound himself in substance as follows: That whereas the said Butler has agreed to save the said Knab harmless from all damages, costs, charges, or expense from or on account of the bond hereinbefore mentioned; and whereas said Butler had agreed to perform at his own cost all the agreements which said Butler and Knab in said bond had obligated themselves to perform; and whereas the said Knab in consideration that the said Butler should, at his own cost and expense, procure the proper deeds for the said lots five and six, in block 43, that he, the said Knab would

execute to said Butler a deed of said lots, seven and eight, in section nine, town. seven, and range seventy-two, except three acres of said land theretoore sold by said Cyrus D Davis, free and clear of all incumbrances suffered by, through, or under him, the said Knab.

And your orator further states, and so charges that the said Knab,
161 was never authorized by your orator to execute the said bond to the said Butler, and that the same was given by the said Knab without the knowledge or consent of your orator; and that, in fact, the said Butler never paid any consideration for the same, but obtained the same by fraudulent representations to the said Knab; and your orator further states, and so charges that the said David Knab has never had any right, title, or interest of, in, or to the said tracts of land first herein mentioned, save and except that he has held the same as security to indemnify himself against any liability which he might incur by reason of the execution of the bond aforesaid to the said Schram, and that the said Tertellus D. Butler never had any right, title, or interest in the said tracts of land, or any part thereof.

And your orator further states that he is informed and believes, and so charges, that the said Tertellus D. Butler has sold, assigned, and transferred, and set over unto the said John J. Orton, his heirs, or assigns, all of the right, title, and interest which the said Butler had in and to the said bond or writing obligatory, executed by the said Knab, and all rights and interests, property, and real estate accruing, or to accrue, under and by reason of the same.

And your orator is informed and believes that the consideration paid by said Orton for said transfer was small, and not equal to one-third of the value of the said tracts of land.

And your orator further states that before and ever since the conveyance by said Cyrus D. Davis to said David Knab of the said tracts of land, your orator has been in possession of the same, and has from time to time paid the taxes thereon.

162 And your orator further states that the conditions of the said bond, so as aforesaid executed by the said Butler and Knab to the said Joseph Schram, have been performed, and that the said Knab is no longer liable on account of the said bond; and that the said Knab is now bound to convey to your orator the said tracts of land free and clear from all incumbrances done or suffered by, through, or under him, the said Knab.

And your orator further states that he has requested the said Knab to convey to him the said tracts of land as aforesaid, but the said Knab has refused to convey the same to him.

And your orator further states that he is informed and believes that the said John J. Orton claims an interest in the said tracts of land under the bond aforesaid, executed by said Knab to said Butler and by said Butler assigned to said Orton, and that he demands a conveyance from said Knab of the same, which the said Knab threatens to give.

And your orator further states that the said tracts of land are at the present time worth at least two thousand dollars.

To the end, therefore, that the said defendants, David Knab, Tertellus D. Butler, and John J. Orton may, if they can, show why your orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written, they ar respectively required to answer, that is to say:

163 1st. Whether the said tracts of land known as lots seven and eigh in section nine, township seven, and range twenty-two, Milwauke

county, Wisconsin, were not conveyed by the said Cyrus D. Davis at the request of the complainant to the said defendant, David Knab, in trust for the purposes hereinbefore set forth?

2d. Whether the said David Knab ever had any right, title, or interest of, in and to the said tracts of land, save and except that he held the same as security to indemnify himself against any liability which he might incur by reason of the execution of the said bond to the said Schram as hereinbefore set forth?

3d. Whether the said David Knab did not receive and hold the said tracts of land in trust for the purposes hereinbefore mentioned and set forth, and subject to be conveyed to the said complainant upon the performance of the conditions contained in the bond executed by the said Butler and Knab to the said Schram?

4th. Whether the said David Knab ever paid any consideration for the said tracts of land; and if so, to whom, and how much, and what is the present value of said tracts of land?

5th. Whether the said Knab ever executed to the said Butler the bond hereinbefore mentioned; and if so, state its contents, and what, if any, consideration was paid by the said Butler for the same, and whether the complainant ever requested or directed the said Knab to execute the same; and if so, at what time, and where?

164 6th. Whether the said Tertullus D. Butler ever had any right, title, or interest of, in and to the said tracts of land; and if so, what interest he had, and when, and how obtained, and from whom, and what consideration he paid for the same?

7th. Whether the said John J. Orton has or ever had any right, title, or interest of, in and to the said tracts of land; and if so, what interest, and when and how obtained, and from whom, and what consideration he paid for the same; and whether he did not know or was not informed at the time such interest was obtained that the said David Knab held the said tracts of land in trust for the said complainant for the purposes hereinbefore named, or in trust for some other purpose?

And your orator prays that the said David Knab may be decreed to convey to your orator the said tracts of land known as lots seven and eight, in section nine, in township seven, and range twenty-two, by good and sufficient deed in the law in fee simple, with a covenant of warranty against any and all incumbrances done or suffered by, through, or under him, the said David Knab; and that the said David Knab, Tertullus D. Butler, and John J. Orton may be enjoined and restrained from selling, assigning, transferring, conveying, encumbering, or in anywise disposing of or intermeddling or interfering with the said lots seven and eight, in section nine, township seven, and range twenty-two, or any part thereof, until the further order of this court to the contrary; and that your orator may have such further or such other relief as the nature of the case may require and as to this court may seem proper and agreeable to equity. May

165 it please the court to grant unto your orator the people's writ of injunction, issuing out of and under the seal of this court, directed to the said David Knab, Tertullus D. Butler, and John J. Orton, commanding them and each of them, their counsellors, attorneys, solicitors, and agents, and each of them, absolutely to desist and refrain from selling, assigning, transferring, conveying, incumbering, or in anywise disposing of, or intermeddling or interfering with the said tracts of land known as lots seven and eight, in section nine, in township seven, and range twenty two, or any part thereof, until the further order of this court to the contrary, and from doing any other act or thing to the injury of your orator touching any of the matters in question; and also a writ of subpœna, to be issued out of and under

the seal of this honorable court, to be directed to the said David Knab, Tertullus D. Butler, and John J. Orton, commanding them, and each of them, by a certain day and under a certain penalty therein to be inserted, to be and appear before this honorable court, and then and there to answer the premises and further to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience.

OTIS HUBBARD.
CHAS. E. JENKINS,
Sol'r for Compl't.
JAS. S. BROWN,
Of Counsel.

STATE OF WISCONSIN,
County of Milwaukee, ss:

On this 5th day of August, A. D. 1851, before me, personally appeared the above-named complainant, Otis Hubbard, and made oath that he had heard read the above bill, subscribed by him, and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters which are therein stated to be on information and belief, and that, as to those matters, he believes them to be true.

And the said Otis Hubbard further made oath that he feared
166 that the said David Knab, one of the defendants named in the said bill of complaint, would give a deed of the property therein mentioned on this day unless an injunction should be immediately granted; and that he has been informed and believes that the said Knab has promised to convey said property to the said John J. Orton this day.

SAMUEL HAEGLIE,
Notary Public, Milwaukee county.

NOTE.—The defendant David Knab is required to answer the 1st, 2d, 3d, 4th, and 5th interrogatories in the above bill contained; the defendant Tertullus D. Butler is required to answer the 5th and 6th interrogatories, and the defendant John J. Orton the 7th interrogatory in the said bill contained.

CHAS. E. JENKINS,
Compl't's Sol'r.

Same day, to wit, August 5, 1851, subpœna issued, directed to the sheriff of the county of Milwaukee, in the words and figures following, to wit:

STATE OF WISCONSIN,
Circuit Court for the County of Milwaukee, ss:

[L. S] The State of Wisconsin to David Knab, Tertullus D. Butler, and John J. Orton, greeting:

We command you that you personally appear before the judge of the second judicial circuit in our court of chancery in and for the county aforesaid, on the eighteenth day of August instant, wheresoever the said court shall then be, to answer to a bill of complaint exhibited against you in our said court by Otis Hubbard, and to do further and receive what our said
court shall have considered in that behalf. And this you are not to
167 omit under a penalty of two hundred and fifty dollars. This process is directed to the sheriff of the county of Milwaukee, who is hereby commanded to serve the same upon the said David Knab, Tertullus D. Butler, and John J. Orton, according to law, if to be found in his county, and due return thereof make.

Witness the honorable Levi Hubbell, judge of the second judicial circuit of the State of Wisconsin, at Milwaukee, the fifth day of August, in the year of our Lord one thousand eight hundred and fifty-one.

HENRY K. WHITE, *Register.*
C. E. JENKINS, *Solicitor.*

Afterwards, to wit, August 8, 1851, and now comes H. W. Tenney, esq., court commissioner, and endorses upon the bill of complaint in this cause a certain order in the words and figures following, to wit: On filing the within bill and a bond of said complainant to said defendants in the penalty of $1,000, conditioned to pay all damages caused by the injunction herein prayed for, let an injunction issue, pursuant to the prayer of the within bill. Aug. 8, 1851.

H. W. TENNEY, *Court Com.*

Same day.—Bond filed in the words and figures following, to wit:

"Know all men by these presents that I, Otis Hubbard, of Milwaukee, Wisconsin, am held and firmly bound unto David Knab, Tertullus D. Butler, and John J. Orton in the sum of one thousand dollars, to be paid to the said David Knab, Tertullus D. Butler, and John J. Orton, their executors, administrators, or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators firmly by these presents.

Sealed with my seal and dated the 8th day of August, 1851.

168 Whereas the above bounden Otis Hubbard has filed his bill of complaint in the district court of Milwaukee, in chancery, praying, among other things, for an injunction to restrain the said David Knab, Tertullus D. Butler, and John J. Orton from selling, assigning, transferring, conveying, encumbering, or in anywise disposing of, intermeddling, or interfering with certain tracts of land in said bill mentioned; and whereas H. W. Tenney, court comm'r, has allowed an injunction for that purpose, according to the prayer of said bill, upon the said complainant's (Otis Hubbard) filing a bond to the said defendant's in the penalty of $1,000, conditioned to pay all damages caused by the injunction in said bill prayed: Now, therefore the condition of the above obligation is such, that if the above bounden Otis, Hubbard, his executors, or administrators, or any of them, shall and do well and truly pay or cause to be paid to the said David Knab, Tertullus D. Butler, and John J. Orton all damages caused to them, or either of them, by the injunction issued, or to be issued, in accordance with the prayer of the said bill of complaint, then this bond to be void, otherwise in force.

OTIS HUBBARD.

Sealed and delivered in presence of—
PARDON POWELL.

Upon which said bond was the following endorsement, to wit:

"I approve the within bond August 8, 1851.

"H. W. TENNEY, *Court Com*"

Afterwards, to wit, August 12, 1851, writ of injunction issued, directed to the sheriff of Milwaukee county, in the words and figures following, to wit:

169 STATE OF WISCONSIN,
Circuit Court, Milwaukee County, to wit:

[L. S.] The State of Wisconsin to David Knab, Tertullus D. Butler, and John J. Orton, greeting:

Whereas it has been represented unto our judge of the second judicial circuit of the State of Wisconsin, on the part of Otis Hubbard, that he had

lately exhibited his bill of complaint against you, the said David Knab, Tertullus D. Butler, and John J. Orton, defendants in the said bill mentioned, to be relieved of the matters therein complained of, in which said bill it is, among other things, set forth that you, the said David Knab, Tertullus D. Butler, and John J. Orton, are combining to injure the said complainant touching matters set forth in his said bill, and that the actings and doings of you, the said David Knab, Tertullus D. Butler, and John J. Orton, are contrary to equity and good conscience:

We, therefore, in consideration of the premises, do hereby command and enjoin you, the said David Knab, Tertullus D. Butler, and John D. Orton, your counsellors, attorneys, solicitors, and agents, under the penalty of ten thousand dollars, to be levied on your goods and chattels, land and tenements, to our use, that you, and each and every of you, do strictly desist and refrain from selling, assigning, transferring, conveying, incumbering, or in anywise disposing of, or intermeddling or interfering with the said tracts of land in said bill mentioned and known as lots seven and eight, in section nine, in township seven, and range twenty-two, or any part thereof, until the further order of our said court of chancery to the contrary, and this under the penalty aforesaid.

170 This process is directed to the sheriff of the county of Milwaukee, who is hereby commanded to serve the same upon the said David Knab, Tertullus D. Butler, and John J. Orton, according to law, and due return thereof make on the third Monday in September, in the year one thousand eight hundred and fifty-one.

Witness the Hon. Levi Hubbell, judge of the second judicial district of said State, at Milwaukee, this 12th day of August, A. D. 1851.

HENRY K. WHITE,
Clerk and Register.

C. E. JENKINS, *Solicitor for Compl't.*

Afterwards, to wit, August 15, 1851, comes the sheriff of Milwaukee county and returns to the office of the clerk of the circuit court aforesaid the writ of injunction to him in this behalf directed, with his endorsement of service thereon in the words and figures following, to wit:

MILWAUKEE COUNTY, *ss:*

I hereby certify that I have served this writ on John J. Orton and David Knab, two of the within-named defendants, by delivering to each a true copy and showing the original—the other named defendant not to be found in my bailwick—this 13th day of August, A. D. 1851.

Fees, $4 40.

JOHN WHITE, *Sheriff.*

171 Afterwards, to wit, August 17, 1851, comes the sheriff aforesaid and returns to the office of the clerk aforesaid the writ of subpœna to him in this behalf directed, with his endorsement of service thereon in the words and figures following, to wit:

"I personally served this subpœna upon the within named David Knab, Tertullus D. Butler, and John J. Orton, defendants, by delivering to each of them a true copy thereof, on the 5th day of August, A. D. 1851.

"Fees, $2 75.

"JOHN WHITE, *Sheriff,*
"By H. L. PAGE, *Under Sheriff.*"

Afterwards, to wit, August 19, 1851, and now comes the complainant, by his solicitor, and files in the office of the clerk of the court aforesaid a certain order in the words and figures following, to wit:

Milwaukee circuit court, Sept. term, 1851.—In chancery.

OTIS HUBBARD
vs.
DAVID KNAB, TERTULLUS D. BUTLER, and JOHN J. ORTON.

The subpœna to appear and answer, issued in this cause, having been returned, personally served on all the above-named defendants, on motion ordered that the said defendants appear, plead, answer, or demur to the said complainant's bill of complaint on or before the 20th day of September next, and that in default thereof the said bill of complaint will be taken as confessed by them.

CHAS. E. JENKINS, *Compl. Sol'r.*

Afterwards, to wit, September 15, 1851, and now comes the said de-
172 fendant, David Knab, by his solicitor, and files in the office of the clerk of the circuit court aforesaid his certain answer in the words and figures following, to wit:

In chancery.

The answer of David Knab, one of the defendants, to the bill of complaint of Otis Hubbard, complainant, against the defendants, Tertullus D. Butler and John J. Orton.

This defendant, reserving to himself all rights of exception to the said bill of complaint for answer thereto, saith that some time in the latter part of June, or fore part of July, 1848, the said complainant inquired of this defendant whether he would be afraid to become security for the said complainant, when he should be ready, to the amount of one thousand dollars, in case the said complainant would give this defendant security for so doing to twice that amount on lots seven and eight mentioned in said bill, and would pay this defendant well for becoming such security, to which this defendant replied that he would not; that about three weeks afterwards, and some five or six days previous to the twenty-second day of July, 1848, the defendant, Tertullus D. Butler, informed this defendant that the said Otis had sold to Joseph Schram part of lots five and six mentioned in said bill for nine hundred and fifty dollars, but that the title to the same was in the name of some person living east, and that Schram was willing to pay five hundred dollars before the title could be obtained if this defendant would become security to said Schram for the repayment of the amount which he should pay for said part of said lots five and six, in case the title should not be conveyed to him within a limited time thereafter; and inquired of this defendant whether the said complainant had had any conversation with this defendant in respect to this defendant becoming security for the said complainant, to which this defendant replied, that the said complainant had
173 inquired of this defendant whether he would be afraid to become security for the said complainant to the amount of one thousand dollars, in case this defendant should be well paid for so doing, and secured on lots seven and eight; that the said Butler then inquired of this defendant whether this defendant was willing to become such security on these terms, to which this defendant replied he did not know; that the said Butler then urged th s defendant to become security for the said defendant, saying that the security which he proposes to give you will be ample—referring to the said lots seven and eight; you know what the land is worth. I have had the title looked over, and the title is perfect. I will become security with you to Schram, referring to Joseph Schram, and he will call on me first. I am worth that

amount, referring to the said sum of one thousand dollars, and you cannot be hurt; that, believing the statements of the said Butler in regard to the title to said lots seven and eight, this defendant then consented to become security for the said complainant on those considerations and terms; that the said Butler then said he would get the papers made out in a few days; that about five or six days afterwards the said Butler informed this defendant that the papers were made out ready for execution; that this defendant and the said Butler then went to the office of Joel W. Heminway, and as soon as we had entered said office the said Butler delivered to this defendant a paper, saying it was a deed of said lots seven and eight to this defendant, and requesting this defendant to sign two bonds then lying on a table in said office; that this defendant then received the said deed from the said Butler, and signed said bonds then lying on said table without having read the said bonds, or having heard them read, or having been accurately informed of their contents; that said deed delivered by said Butler to this de-
174 fendant at the time of the execution of said bonds, as aforesaid, is a quit-claim deed from Cyrus D. Davis and Caroline, his wife, to this defendant in fee of said lots seven and eight, except three acres previously conveyed to ; is dated the twentieth day of July, 1848, and is witnessed by the said Butler, and acknowledged before the said Butler as justice of the peace, and recorded in volume 25 of Deeds, on page 136; that previous to the delivery of the said deed to this defendant, as aforesaid, and after the time this defendant consented to become security for the said complainant, as aforesaid, the said Butler had informed this defendant that the manner of giving this defendant security on said lots seven and eight would be by deed; that the title to said lots seven and eight was in the name of the said Davis, and that the deed would come from the said Davis.

And this defendant further answering saith, that at the time of the execution of said bonds, as aforesaid, this defendant supposed that one of them bound this defendant to repay to said Schram the amount of purchase money which he should pay for said part of said lots five and six, in case the said complainant should not procure from the persons in whose names the title to the same was the necessary powers of attorney, and cause the title to said part of said lots five and six to be vested in the said Schram in three months from that time, and neither the said complainant, nor the said Butler, should repay said Schram the amount of said purchase money which he should have paid for said part of said lots five and six, as aforesaid.

And this defendant further answering saith, that at the time of the execution of the said bonds aforesaid he supposed that the other of said bonds obligated this defendant, in case he should be discharged from liability on the bond to Schram, to redeed said lots seven and eight to said Davis or
175 some other person for said complainants, implied benefit upon being paid a reasonable compensation for defendant's trouble and loss of time in consequence of becoming such security, as aforesaid.

And this defendant, further answering, saith, that on the sixth day of August, 1851, the defendant, John J. Orton, filed his bill in this honorable court against this defendant to convey the said lots seven and eight to the said Orton as assignee of the said Butler, and of the bond for the reconveyance thereof executed by this defendant as aforesaid.

And this defendant, further answering, saith, that in said Orton's said bill it is alleged that this defendant executed to the said Tertullus D. Butler a bond to the purport and effect following, to wit:

"Know all men by these presents that I, David Knab, of the city and county of Milwaukee, Wisconsin, am held and firmly bound unto Tertullus D. Butler, of the same place, in the sum of two thousand dollars, lawful money, for the payment of which sum, well and truly to be made to the

said Butler, his heirs, executors, administrators, and assigns, each and every of them, firmly by these presents, sealed with my seal, and dated this twenty-second day of July, 1848. Whereas the said Knab has, jointly with the said Butler, executed to one Joseph Schram a bond with even date herewith, wherein said Butler and Knab bind themselves, their heirs, &c., to execute to said Schram a deed of a part of lots five and six (5 and 6) in block forty-three, (43,) in the second ward of said city of Milwaukee, for a more particular description of which premises reference may be had to said bond; and whereas said Butler and Knab, in said bond, further agreed to procure a deed of said premises in said bond described from Emily
176 Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard to themselves, the said Butler and Knab, before said Butler and Knab should execute the deed as above mentioned to said Schram; and whereas said Butler and Knab, in said bond, made certain other agreements to and with the said Schram, for which agreements, and a full explanation of all the agreements of the said Butler and Knab with said Schram, reference is hereby made to said bond; and whereas said Knab executed said bond with said Butler to said Schram as security for said Butler for the performance of the covenants and agreements on the part of said Butler and Knab in said bond contained; and whereas said Butler has agreed to procure the deed from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard to said Butler and Knab, as in said bond mentioned, at the proper cost and expense of himself, the said Butler; and whereas the said Butler has agreed to save the said Knab harmless from all damage, costs, charges, or expenses from or on account of said bond; and whereas said Butler has agreed to perform, at his own costs, all the agreements which said Butler and Knab, in said bond, have obligated themselves to perform; and whereas the said Knab, in consideration that the said Butler shall, at his own costs and expenses, procure the deed above mentioned from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, and shall, at his, the said Butler's, own costs and expenses, perform all the agreements which said Butler and Knab, in said bond, have obligated themselves to perform, except wherein said Butler and Knab agree to execute to said Schram a deed of said premises, which said Butler and Knab are both to execute, has agreed to convey to said Butler the following described real estate, viz: lots seven, (7,) eight, (8,) of sec-
177 tion nine, (9,) in township No. seven, (7,) north of range No. twenty-two (22) east, in the district of lands subject to sale, at Milwaukee, Wisconsin, except three acres of said tracts of land heretofore sold by Cyrus D. Davis: Now, therefore, the condition of this obligation is such, that if, on the performance on the part of said Butler of his agreements as in the said bond mentioned, said Knab shall execute to said Butler, his heirs and assigns, a deed of said last described premises free and clear of all incumbrances suffered by, through, or under him, the said Knab, then this obligation to be void, otherwise in full force, power, and virtue."

"And this defendant, further answering, saith, that he believes that he executed a bond of the purport and effect above set forth, as is alleged in said Orton's said bill; and if so, that the bond above set forth is one of the bonds signed by this defendant in the office of the said Heminway as aforesaid, and that the execution and delivery thereof by this defendant consisted merely in this defendant signing the same in the office of the said Hemenway as aforesaid, without having read the same or having heard it read, or having been accurately informed of its contents, and without orally acknowledging the execution thereof, and by immediately leaving said office whilst said bond was still lying on the table on which it was so

signed, with the said Butler and the person whom this defendant supposed had drawn the same.

"And this defendant, further answering, saith, that in the spring of 1851 he had been informed, and he believes it to be true, that the said bond above set forth had been assigned by the said Butler to the said Orton.

178 "And this defendant, further answering, saith, that it is alleged in said Orton's said bill that the bond to which reference is made in the bond above set forth is in the words or to the purport following, to wit:

"Know all men by these presents that we, Tertullus D. Butler and David Knab, of the city of Milwaukee and State of Wisconsin, holden and stand firmly bound and obliged unto Joseph Schram, of the same place, in the full and just sum of two thousand dollars, lawful money, to be paid unto the said Joseph Schram, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, each and every of them, by these presents.

"Witness our hands and seal, dated the 22d day of July, in the year of our Lord one thousand eight hundred and forty-eight.

"Whereas the said Butler and Knab, for and in consideration of the sum of nine hundred dollars, have agreed to convey to said Schram the following real estate, situate in the second ward of said city of Milwaukee, being a part of lots five (5) and six, (6,) in block forty-three, (43,) commencing on Chestnut street, twenty-five feet east of the northwest corner of said lot five (5;) thence south one hundred and twenty feet (120;) thence west, parallel with the north line of said lot, twenty-five (25) feet, to the west line of said lots five (5;) thence north, on said west line, sixty feet; thence west, parallel with the north line of said lot six, (6,) ten (10) feet; thence north, parallel with the east line of said lot six, (6,) sixty feet, to the north line of said lot six (6;) thence east thirty-five (35) feet, along the north line of said lots five and six, (5 and 6,) to the place of beginning; being twenty-five feet front on Chestnut street by one hundred and twenty feet deep of said lot five, (5,) and ten feet front on Chestnut street by sixty feet deep of said lot six (6;) and whereas the title to said premises above de-

179 scribed is now in Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, and the said Butler and Knab have agreed to procure from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard a deed of the said premises to themselves, the said Butler and Knab, and to do such further acts as may be necessary to make the title to said premises free and clear of all and every incumbrance or incumbrances in themselves, the said Butler and Knab; and whereas the said Butler and Knab have, for the consideration above mentioned, agreed to convey to said Schram, his heirs and assigns forever, the above premises by a good and sufficient deed in law in fee simple, with full covenants of warranty against all and every incumbrance or incumbrances of what name and kind soever, except a lease of said premises for the term of one year from the first day of May, A. D. 1848, said deed to be executed within three months from the date hereof, and to be delivered to said Schram upon the execution by said Schram and delivery to said Butler and Knab of a mortgage upon said premises for the sum of three hundred and fifty dollars, payable in eighteen months from the date hereof with seven per cent. per annum interest; and whereas said Butler and Knab have further agreed that the said Schram shall have immediate possession of said premises, subject to said lease above mentioned: Now the condition of this obligation is such, that if the said Butler and Knab shall procure a deed as above mentioned from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard within three months from the date hereof, and shall convey said premises to said Schram as above agreed, and shall well and truly perform all these agree-

ments in this instrument contained, then this obligation to be void, otherwise to remain in full force and virtue."

180 And this defendant, further answering, saith, that he believes that he and the said Butler executed to the said Joseph Schram the bond last above set forth, as is alleged in said Orton's said bill; but this defendant, according to the best of his recollection, did not see the said Butler sign the same; and if the said bond herein last set forth was executed by this defendant, it is the other of the bonds signed by this defendant in the office of the said Heminway, as aforesaid, and it was executed, acknowledged, and delivered by this defendant at the same time and place, and in the same manner in every respect, as the said bond herein first set forth, without this defendant having read it, or having heard it read, or having been accurately informed of its contents.

And this defendant, further answering, saith, that he never had any conversation, agreement, or understanding with the said Butler and Schram, or either of them, by which it was agreed or understood that this defendant was to receive any part of the purchase money for said part of said lots five and six, or that a mortgage for any part of said purchase money was to be executed by said Schram to this defendant and the said Butler, or to this defendant alone, nor did this defendant ever receive any part of said purchase money, nor of said sum of nine hundred dollars mentioned in said bond herein last set forth; and this defendant does not know to whom said purchase money, or any part thereof, was paid by said Schram, nor has this defendant ever heard or been informed whether the said Schram entered into an agreement with the said Butler to execute to the said Butler and this defendant a mortgage as mentioned in said bond herein last set forth; but this defendant believes that such an agreement was entered into by said Schram and said Butler, and this defendant has never heard or

181 been informed whether any such mortgage was ever executed by said Schram to the said Butler and this defendant, but this defendant believes that the said Schram never executed any such mortgage.

And this defendant, further answering, saith, that in the said Orton's said bill it is alleged that on the first day of August, 1851, the said bond herein last set forth was assigned by the said Schram to the said Orton, and this defendant believes that the said bond herein last set forth was assigned by said Schram to said Orton at the time mentioned in said Orton's said bill.

And this defendant, further answering, saith, that he has been informed, and believes it to be true, that the condition of the said bond herein last set forth has been wholly or in part performed or satisfied in substance as follows, namely: by a power of attorney of the twenty-eighth day of August, 1848, from Lewis F. Hubbard to the said complainant, and by deeds of the fifteenth of December, 1848, from Emily Hubbard, and of the thirty-first of January, 1849, from Charles F. Bates, and Julia Bates, his wife, and of the first of March, 1850, from William Jewell and Emily J. Jewell, his wife, of their respective interest in said part of said lots five and six to the said complainant, and by deed of the fourth of July, 1850, from the said complainant, and the said Lewis F. Hubbard, by the said complainant, his attorney, as aforesaid, of their respective interest in said part of said lots five and six to the said Joseph Schram; and this defendant is advised and believes that the condition of the said bond herein last set forth is, in effect, satisfied by the assignment of both of said bonds to the said Orton, but this defendant believes that the condition of the said bond herein last set forth has never been performed or satisfied in whole or in part, so far as relates to the conveyance of the title to the said part of said lots five and six in any other manner than is hereinbefore stated.

182 And this defendant, further answering, saith, at the time of the execution of the said bonds, this defendant supposed that the legal title to said lots seven and eight, except said three acres, was vested in this defendant by the delivery of the said deed from the said Davis and wife to this defendant as aforesaid, but this defendant has never pretended to have any interest in said lots seven and eight, other than was vested in him by said deed from said Davis and wife to this defendant.

And this defendant, further answering, saith, that he did not request the said complainant to direct the said Davis to convey to this defendant the said lots seven and eight, or any part thereof.

And this defendant, further answering, saith, that he knows not, and has not been informed, save by the said complainant's bill, and cannot set forth as to his belief or otherwise, whether the said Davis and wife executed to this defendant the said deed of said lots seven and eight at the request of the said complainant.

And this defendant, further answering, saith, that he knows not, and has not been informed, save by the said complainant's bill, and cannot set forth as to his belief or otherwise, whether, ever since the conveyance of the said lots seven and eight to this defendant as aforesaid, the said complainant has been in possession of the same, or whether he has from time to time paid the taxes thereon.

And this defendant, further answering, saith, that some three or four days previous to the commencement of this suit, the said complainant requested this defendant to execute a deed of said lots seven and eight to the said complainant, which this defendant declined to do, as the said Orton had demanded a deed of the same from this defendant on the bond herein first set forth.

183 And this defendant, further answering, saith, that he is unable to state whether the said complainant is entitled to a deed for said lots seven and eight, and therefore desires to submit that question to the decision of this honorable court.

And this defendant, further answering, saith, that he is ready and willing, and hereby offers to convey said lots seven and eight to whomsoever this honorable court shall deem entitled to the same, upon the cancellation of said bond herein first set forth, and upon such terms as to compensation, costs, and expenses, as this honorable court shall deem just.

DAVID KNAB.
W. W. GRAHAM,
Sol. and Counsel for Def't Knab.

STATE OF WISCONSIN,
County and City of Milwaukee, ss:

On this 15th day of September, 1851, before me personally appeared the above-named David Knab, and made oath that he has heard read the above answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and as to those matters he believes it to be true.

JOHN F. SMITH, *Notary Public.*

Afterwards, to wit, September 18, 1851, and now comes the defendants by their solicitor, and files in the office of the clerk of this court aforesaid their demurrer to the bill of complaint, in the words and figures following, to wit:

In the Milwaukee circuit court of the Sept. term, 1851.—In chancery.

OTIS HUBBARD
vs.
DAVID KNAB, TERTULLUS D. BUTLER, and JOHN J. ORTON.

184 The demurrer of the above-named defendants to the complainant's bill of complaint. These defendants, respectfully, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer, show that the said complainant hath not in, and by his said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against these defendants, and for further and special cause of demurrer, show:

1st. That the complainant has not by his said bill set forth with sufficient certainty the right, title, and interest of the said complainant or the nature of the said title to the premises therein described.

2ndly. That the complainant has not by his said bill set forth any actual right or title to the premises therein described to authorize a decree for a conveyance thereof to said complaint.

Wherefore these defendants demand the judgment of this honorable court, whether they shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained. Dated this 17th day of September, A. D. 1851.

H. S. ORTON, *Solicitor.*
M. H. ORTON,
Of Counsel for Defendants.

I certify in my opinion the above demurrer is well taken in point of law.
M. H. ORTON.
Counsel, &c., of Counsel for Defendants.

185 STATE OF WISCONSIN,
Milwaukee County, ss:

H. S. Orton, solicitor for the above defendants, being duly sworn upon his oath saith, that the above demurrer is not interposed for delay.
H. S. ORTON.

Subscribed and sworn to before me this 18th day of Sept., A. D. 1851
A. McARTHUR,
Notary Public, Mil. Co.

Afterwards, to wit, September 25, 1851, and now comes the complainant by his solicitor, and files in the office of the clerk of the circuit court aforesaid his replication and notice, in the words and figures following, to wit:

Milwaukee circuit court.—In chancery.

OTIS HUBBARD
vs.
DAVID KNAB, TERTULLUS D. BUTLER, and JOHN J. ORTON.

The replication of Otis Hubbard, complainant, to the answer of David Knab one of the defendants.

This repliant, reserving to himself all benefit of exception to the many insufficiences of the said answer for replication thereunto, says that he will

aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein, and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied is true, all which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

CHAS. E. JENKINS,
Sol. for Compl't.
J. S. BROWN, *of Counsel.*

186 Milw. Circuit court.—In chancery.

OTIS HUBBARD
vs.
DAVID KNAB, TERTULLUS D. BUTLER, and JOHN J. ORTON.

The clerk will please set down this cause for hearing on the demurrer filed therein, on the first Monday in October next, or as soon thereafter as counsel can be heard.

JENKINS, *Sol'r for Compl't.*

Afterwards, to wit, Oct. 4, 1851, in the term of Sept., A. D. 1851, of the court aforesaid, this cause continued. Afterwards, to wit, February 9, 1852, notice and suggestion filed in the words and figures following, to wit:

Milw. circuit court.—In chancery.

OTIS HUBBARD
vs.
DAVID KNAB, TERTULLUS D. BUTLER, and JOHN J. ORTON.

And now comes Increase A. Lapham, administrator, &c., of the estate of Otis Hubbard, dec'd, and suggests to the said court that the said Otis Hubbard has died since the last term of this court, and the said Lapham asks leave of the said court to appear, and take upon himself the prosecution of this suit.

C. E. JENKINS, *Sol. Comp't.*

April 3, 1852.—And now come the parties by their solicitors, and the
187 demurrer in this cause coming on to be argued, and the same being submitted to the court, it is considered and adjudged that said demurrer be, and hereby is, overruled with costs, and it is further ordered by the court that defendants, Butler and Orton, file their answer in ten days from this date.

Afterwards, to wit, April 6, 1852, and now comes the said defendant, J. J. Orton, by his solicitor, and files in the office of the clerk of the circuit court aforesaid his certain answer in the words and figures following, to wit:

In chancery.—Circuit court, Milwaukee county.

The separate answer of John J. Orton, one of the defendants to the bill of complaint of Otis Hubbard, complainant.

This defendant, saving and reserving unto himself all advantage of exception to said complainant's bill of complaint, answering, says, that he has a right and interest of, in and to said tracts of land referred to in said

bond of said Knab to said Butler, known as lots seven and eight, (7 and 8,) sec. 9, town. 7, range 22, except three acres sold b Davis, in said complainant's bill mentioned as the assignee and owner of said bond, a copy of which is hereunto annexed, marked "Exhibit A," which said bond was assigned to this defendant by the said defendant, Butler, therein named, at the time and for the consideration mentioned in said assignment, endorsed upon the back of said bond, a copy of which said assignment is hereunto annexed, marked "Exhibit B," which said bond and assignment are ready to be produced by this defendant, the owner and holder thereof, as this honorable court shall direct; that said Butler and this defendant, as such assignee, have performed the conditions precedent on the part of the said obligee to be performed; and that this defendant has demanded and
188 claims the right to have, from the said defendant, David Knab, a deed of conveyance of said land from said Knab to this defendant, according to the conditions of said bond; and that the amount of the consideration mentioned in said assignment is made up of money obligations of this defendant, claims, and accounts against the said Butler, payments and services in fulfilling the conditions precedent of the said obligee aforesaid in said bond of said Knab to said Butler by performing the conditions of the bond to Schram therein referred to, and in payment of taxes and assessments on said tracts of land above mentioned.

And this defendant, further answering, says, that he did not know, nor was he informed at or before the time such interest was obtained as aforesaid, that the said David Knab held the same land aforesaid in trust for said complainant, or for any other person or purpose whatever, except according to the conditions of his, said Knab's, bond to said Butler, but on the contrary, was expressly informed by said Butler that he was the sole owner of said interest in said bond mentioned; and further, that said Knab informed this defendant, subsequent to the assignment aforesaid, that he received the title of the premises aforesaid from said Davis by and through said Butler, and was bound to assign, transfer, and convey the same to said Butler, or his assigns, on the fulfilment of the conditions of his said bond to Butler, and that on the fulfilment of said conditions, he would so convey said premises by a good and sufficient deed of conveyance, according to his said bond, to this defendant as assignee of said Butler, and the owner and holder of said bond mentioned; and that said Knab owned and confessed, and stated to this defendant that he did not know of any interest or trust, right or claim, of, in, or to said lands mentioned, except the
189 interest of said Butler in his, said Knab's, bond to said Butler aforesaid, of any other person or persons whatsoever; and this defendant then requested of said Knab to give to this defendant the deed of conveyance according to the conditions of his said bond to Butler aforesaid, and offered to indemnify him, said Knab, by sufficient security against his liability on his said bond to Schram; and that said Knab objected to giving said deed until he should be relieved from liability on his said bond to Schram, but promised and agreed to and with this defendant that on his being relieved from his liability on his said bond to Schram, he would convey to this defendant the lands aforesaid according to the conditions of his said bond to Butler; and that this defendant did fulfil and perform the unperformed conditions of said Knab's bond to Schram by paying off, discharging, and assuming judgments, debts, and demands of said complainant at great expense of money, time, labor, and services, and procured the assignment of said Knab's bond to said Schram to this defendant, and offered said Knab to cancel and satisfy the same if he would execute said deed of said land to this defendant according to the conditions of his said bond to

Butler, and that then said Knab refused to execute the same, and still doth refuse, in opposition to his express agreement as aforesaid.

And this defendant, further answering, says, that he is informed and verily believes said Butler did own all the right and interest of, in, and to said lands mentioned, at the time of his assignment and sale of said Knab's bond to this defendant aforesaid; and that said Butler, as such owner as aforesaid of all the right and interest in, of, and to said lands, had the sole and only possession of said lands from the time of the conveyance of said Davis to said Knab, as aforesaid, to the time of the said sale and assignment of said Knab's bond to this defendant; and that said complainant never had possession of said lands mentioned, or any interest in, of, or to said land since he had title, which was only momentary, in 1841, and that said com plainant has not paid the taxes on the same.

190 And this defendant, further answering, on information and belief, denies that the said complainant has had any interest of, in, or to said lands since his, said complainant's, conveyance of the same in 1841, or any possession of the same, or that said Knab held the said lands in trust for said complainant, or that said Butler obtained said bond from said Knab by fraudulent representations, or in any other improper manner whatever.

And this defendant further saith, that said Knab's bond to said Butler was not sold and transferred to this defendant without full and sufficient consideration paid therefor; and that this defendant never heard that said complainant had or claimed any interest of, in, or to said lands in said bond mentioned, until at or about the filing of said complainant's bill of complaint, and then only through said bill; and as this defendant is informed and believes that if the said complainant ever had or claimed an interest in said lands, such interest and claim was designedly concealed and kept from the knowledge of innocent purchasers and creditors.

All which matters and things this defendant is ready to verify, maintain, aver, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in that behalf most wrongfully sustained.

J. J. ORTON.
H. S. ORTON, *Sol'r.*
M. H. ORTON,
Of Counsel for Def't Orton.

STATE OF WISCONSIN,
Milwaukee County, ss:

On this 6th day of April, A. D. 1852, before me personally appeared the above-named J. J. Orton and made oath that he has read the above answer, subscribed by him, and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters which are therein stated to be on information and belief, and that as to those matters he believes it to be true.

E. MARINER,
Notary Public, State of Wisconsin.

191 EXHIBIT A.

Know all men by these presents that I, David Knab, of the city and county of Milwaukee, Wisconsin, am held and firmly bound unto Tertullus D. Butler, of the same place, in the sum of two thousand dollars, lawful money, for the payment of which sum well and truly to be made to said Butler, his heirs, executors, administrators, and assigns, I bind myself, my heirs, executors, and assigns, each and every of them, firmly by these presents, sealed with my seal, and dated this twenty-second day of July, A. D. 1848.

Wheras the said Knab has jointly with said Butler executed to one Joseph Schram, a bond of even date herewith, wherein said Butler and Knab bind themselves, their heirs, &c., to execute to said Schram a deed of a part of lots five and six, (5 and 6,) in block forty-three, (43,) in the second ward of said city of Milwaukee, for a more particular description of which premises, reference may be had to said bond; and whereas said Butler and Knab in said bond further agreed to procure a deed of said premises in said bond, described from Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, to themselves, the said Butler and Knab, before said Butler and Knab should execute the deed as above mentioned to said Schram; and whereas said Butler and Knab, in said bond, made certain other agreements to and with said Schram, for which agreement, and for a full explanation of all the agreements of said Butler and Knab with said Schram, reference is hereby made to said bond; and whereas said Knab executed said bond with said Butler to said Schram as security for said Butler for the performance of the covenants and agreements on the part of said Butler and Knab in said bond contained.

And whereas said Butler has agreed to procure the deed from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, to said Butler and Knab, as in said bond mentioned, at the proper cost and expense
192 of himself, the said Butler.

And whereas the said Butler has agreed to save the said Knab harmless from all damages, cost, charges, or expense from or on account of said bond.

And whereas said Butler has agreed to perform at his own cost all the agreements which said Butler and Knab in said bond have obligated themselves to perform.

And whereas the said Knab, in consideration that the said Butler shall, at his own cost and expense, procure the deed above mentioned from said Emily Hubbard, Julia Bates, Emily Jewell, and Lewis F. Hubbard, and shall at his, the said Butler's own cost and expense, perform all the agreements which said Butler and Knab in said bond had obligated themselves to perform, except where said Butler and Knab agree to execute to said Schram a deed of said premises, which said Butler and Knab are both to execute, has agreed to convey to said Butler the following described real estate, viz: Lots seven (7) and eight (8) of section nine, (9,) in township No. seven, (7,) north of range No. twenty-two (22) east, in the district of lands subject to sale at Milwaukee, Wisconsin, except three acres of said tracts of land heretofore sold by Cyrus D. Davis.

Now, therefore, the condition of this obligation is such that, if on the performance on the part of said Butler of his agreements, as in this bond mentioned, said Knab shall execute to said Butler, his heirs, and assigns, a deed of said last described premises, free and clear of all incumbrances suffered by, through, or under him, the said Knab, then this obligation to be void, otherwise in full force, power, and virtue.

DAVID KNAB. [L. S.]

In presence of—
F. RIPLEY,
CHAS. K. WELLS.

STATE OF WISCONSIN,
Milwaukee County, ss:

193 On this 25th day of July, A. D. 1848, before me personally appeared David Knab, to me known to be the person who executed the foregoing bond, and acknowledged the same to be his free act and deed.

FRANKLIN RIPLEY, *Notary Public.*

EXHIBIT B.

In consideration of twenty-one hundred dollars to me paid by J. J. Orton, I hereby sell, assign, transfer, and set over to him, his heirs, or assigns, all my right, title, and interest in and to the within bond or writing obligatory, and all rights and interests, property, real estate, &c., &c., accruing, or to accrue, under and by reason of the same, and I hereby empower said Orton to pursue all legal measures to the recovery and full enjoyment of the same.

Witness my hand and seal this 22d day of February, A. D. 1851.

T. D. BUTLER. [SEAL.]

In presence of—
ELIHU SPENCER,
HERMAN C. BEVERUNG.

STATE OF WISCONSIN,
Milwaukee County, ss:

Be it known 13th day of March, A. D. 1851, before me personally came the above T. D. Butler, to me known to be the person who executed the above instrument, and acknowledged that he executed the same for the uses and purposes therein mentioned.

HERMAN C. BEVERUNG,
Notary Public, residing in Milwaukee City.

Same day, to wit, April 6, 1852, and now comes the said defendant, Tertullus D. Butler, by his solicitor, and files in the office of the clerk of the circuit court aforesaid his certain answer in the words and figures following, to wit:

194 Circuit Court of Milwaukee county.—In chancery.

The separate answer of Tertullus D. Butler, one of the defendants, to the bill of complaint of Otis Hubbard, complainant.

The defendant, saving and reserving to himself all advantages of exception to said bill of complaint for answer to the 5th interrogatory in said bill, says that the said Knab did execute to him, this defendant, the said bond, and that the contents thereof are, in effect, as set forth by said complainant in his said bill of complaint; that the consideration thereof was that the land described in said bond was by this defendant caused to be conveyed to the said Knab in consideration of, and to indemnify the said Knab against any liability he might incur by reason of said bond given by said Knab and this defendant to said Schram; and that this defendant owned, and had the right to cause said land to be thus conveyed to the said Knab for such indemnity, and that the consideration of the said bond executed by the said Knab to this defendant was, that this defendant should save the said Knab free and clear of any liability on account of said bond, so as above executed by the said Knab and this defendant to the said Schram

And this defendant further answers and saith, that the said complainant did request the said Knab to execute the said bond to this defendant, and that the same was done with the knowledge and consent of said complainant, at or about the time of its execution, in the city of Milwaukee and State of Wisconsin.

And the 6th interrogatory this defendant, further answering, says, that this defendant did have an interest in said tracts of land, and that he was the *bona fide* owner of the whole of said lands; that previously to the conveyance of the said lands by the said Cyrus D. Davis to the said

195 Knab, this defendant purchased of and from said complainant the said lands for divers goods, wares and merchandise, work and labor, care and diligence, and in consideration of the support and maintenance of the said complainant, and in consideration of natural love and affection on the part of said complainant to this defendant, and in consideration of money paid, work done and performed, and support and maintenance to the said complainant, and for his use and benefit before that time, paid and done to and for the use of said complainant, and that this defendant did pay to said complainant a good and valuable consideration for the said lands, and had right to direct the conveyance thereof to the said Knab as aforesaid, which accounts for, and is the only reason why the said Knab obligated himself by said bond to convey unto this defendant a deed for lots 7 and 8.

And as a further consideration in this behalf, said defendant further says, that after the execution of the said bond by this defendant, and said Knab to the said Schram, this defendant, at his own expense, went to the east and procured the title to the said lots 5 and 6 from the various individuals who then held the legal title to said lots, and in the transaction of said business he necessarily expended over one hundred dollars, besides his time and trouble in this behalf expended; and also did pay all expenses for the writing and execution of both said bonds, all of which was done by the knowledge of said complainant, and in pursuance of their previous intention and understanding, and which formed an additional consideration between this defendant and the said complainant.

And this defendant, further answering, says, that he denies that said complainant had any possession of said lands mentioned in said Knab's bond to this defendant since the transfer of the said land by the said Cyrus
196 D. Davis to said Knab, or that he did pay the taxes from time to time on said land since 1848.

And this defendant, further answering, says, that from the time said land was conveyed from said Davis to Knab, to the time of the sale and transfer of said Knab's bond to said J. J. Orton in said bill of complaint mentioned, he, this def't, had the only and sole possession of said premises in said Knab's bond mentioned, and that no other person has had the possession of the said premises since the deed to the said Knab, to his knowledge; that he was the *bona fide* purchaser and owner of said lands, and of the interest therein, not only from the understanding and the action of said complainant and this def't, but by the bond of said Knab to him as aforesaid, and had a right to a deed from said Knab on fulfilling the conditions of the said bond from this def't and Knab to said Schram.

And this def't, as such owner, and being the obligee of said bond from Knab to himself, did, for a valuable and sufficient consideration, sell, assign, transfer, and set over to said J. J. Orton, the said bond from Knab to this defendant, and that he expressly told said Orton at the time of said transfer that said Knab was bound to convey to him to said Butler, and to his assigns, by a good and sufficient deed, said land mentioned therein, according to the conditions of the said bond, and that no other person or persons whatsoever had any right, title, interest, or claim, either legal or equitable, to to the said lots 7 and 8, and as this defendant is informed and believes that said Orton was ignorant of any other person or persons having or claiming any right, title, or interest in the said land.

And the said defendant, further answering, says, that the said Knab did not, nor never did, hold said premises, to wit, lots 7 and 8, in section 9, town 7, range 22, in trust for said complainant, or for any other person or
197 persons whatsoever, except for this defendant, and according to the conditions of the said Knab's bond to him as aforesaid, which said Knab executed on receiving from this defendant the deed from Davis to him

as aforesaid, which was procured at the instance, request, and expense of this defendant; that said Knab well knew the contents and the character of the said bond to this def't at the time of its execution, and even before, and that the said bond was given to this def't in good faith, and without any false pretences and fraudulent representations of any kind or nature whatever, but that the charge in said bill of his having made such representations to procure the said bond from the said Knab, this defendant states is false in fact and unfounded in truth, and this def't repeats that said bond from Knab to him was given in consideration of receiving a deed of conveyance to said premises from this def't, executed by said Davis, and that this def't believes that said Knab, up to the time of the assignment of said bond to said Orton, was wholly ignorant of any interest claimed or pretended to be claimed by said complainant, Otis Hubbard, or any other person except by this defendant.

All which matters and things this defendant is ready to verify, aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in that behalf most wrongfully sustained.

T. D. BUTLER,
H. S. ORTON, *Sol'r.*
M. H. ORTON,
Of Counsel for D'f't Butler.

STATE OF WISCONSIN,
Milwaukee County, ss:

On this 6th day of April, A. D. 1852, before me personally appeared the above named Tertullus D. Butler, and made oath that he has read the
198 answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and that as to those matters he believes them to be true.

E. MARINER,
Notary Public, State of Wisconsin.

Afterwards, to wit, April 27, 1852, comes the complainant, by his solicitor, and files his replication to the answers of defendants, Butler and Orton, in the words and figures following, to wit:

Milwaukee circuit court.—In chancery.

The replication of Increase A. Lapham, administrator of the estate of Otis Hubbard, deceased, to the answer of Tertullus D. Butler, defendant.

This repliant, saving advantage of exception to the said answer for replication thereunto, says, that he will ever maintain and prove the bill of complaint filed by the said Otis Hubbard, as complainant, in his life time, against the said Tertullus D. Butler, John J. Orton, and David Knab, to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant Butler is uncertain, untrue, and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

CHAS. E. JENKINS, *Sol'r.*

199 Milwaukee circuit court.—In chancery.

The replication of Increase A. Lapham, administrator of the estate of Otis Hubbard, deceased, to the answer of John J. Orton, defendant.

This repliant, saving advantage of exception to the said answer for replication thereunto, says, that he will aver, maintain, and prove the bill of complaint filed by the said Otis Hubbard, as complainant, in his life time, against the said John J. Orton, Tertullus D. Butler, and David Knab, to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant Orton is uncertain, untrue, and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All of which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

CHAS. E. JENKINS, *Sol'r.*

Afterwards, to wit, May 21, 1852, stipulations filed in words and figures following, to wit:

Milwaukee circuit court.—In chancery.

INCREASE A. LAPHAM, adm. of estate of Otis Hubbard,
vs.
DAVID KNAB, TERTULLUS D. BUTLER, AND JOHN J. ORTON.

200 It is hereby stipulated and agreed between the said parties, by their respective solicitors, that testimony on either side shall be taken before H. W. Tenney, sup. c't comm., on verbal interrogatories, written interrogatories being hereby waived, and that but two days' notice shall be required from either party of the examination of witnesses on either side.

CHAS. E. JENKINS,
Sol'r for Compl't.
M. H. ORTON,
Sol'r for Butler and Orton, Def's.
W. W. GRAHAM,
Sol. for Def't Knab.

Afterwards, to wit, November 20, 1852, decree entered in the words and figures following, to wit:

Milwaukee county circuit court.—In equity.

OTIS HUBBARD, by J. A. Lapham, adm'r,
vs.
DAVID KNAB, TERTULLUS D. BUTLER, AND JOHN J. ORTON.

At a special term of said court held for the county of Milwaukee, at the city of Milwaukee, on the 20th day of November, 1852, present, Levi Hubbell, judge of said circuit court.

This cause being brought to a hearing on the pleadings filed in said cause, and the said pleadings having been read, and Charles James, counsel for defendants, having been heard, and the court having duly considered the said pleadings, proofs, and arguments, and it appearing to the court

that the complainant have failed to establish his case by competent proof it is thereupon ordered, adjudged, and decreed, and this court, in
201 virtue of the power therein vested, doth order, adjudge, and decree that the complainant's bill be dismissed with costs, and the injunction therein dissolved, with leave to complainant to apply to have this decree set aside at any time on or before the first day of next term.

And it is further ordered and decreed that the said complainant do pay to the defendants the cost of this suit to be taxed.

And it is further ordered and decreed the said defendants have execution against the said complainant for the costs to be taxed, according to the course and practice of this court.

Dated Nov'r 20th, 1852.

By the court:

LEVI HUBBELL.

Afterwards, to wit, November 22, 1852.—And now comes the complainant, by his solicitor, and on his motion it is considered and adjudged by the court now here that the decree dismissing the bill in this cause be vacated and set aside, and that the complainants have until ——— ——— next to take testimony.

Afterwards, to wit, December 19, 1853, substitution filed in the words and figures following, to wit:

Circuit court of Milwaukee county.—In chancery.

INCREASE A. LAPHAM, administrator of the estate of Otis Hubbard, deceased,
vs.
DAVID KNAB *et al.*

Let the names of Ogden and Brown be substituted as attorneys of record in the above-entitled cause for mine.

CHAS. E. JENKINS,
Att'y for Pl'ffs.

202 Same day, to wit, Dec. 19, 1853, comes the complainant, by his solicitor, and files discontinuance, in the words and figures following, to wit:

Circuit court of Milwaukee county.—In chancery.

INCREASE A. LAPHAM, administrator of Otis Hubbard, deceased,
vs.
DAVID KNAB, JOHN J. ORTON, AND TERTULLUS D. BUTLER.

Said suit is hereby discontinued against the said John J. Orton, and Tertullus D. Butler.

BROWN & OGDEN,
Sol'rs for Compl'ts.

Same day, to wit, Dec. 19, 1853, stipulation filed in the words and figures following, to wit:

Circuit court of Milwaukee county.—In chancery.

INCREASE A. LAPHAM, administrator of Otis Hubbard, deceased,
vs
DAVID KNAB, JOHN J. ORTON, AND TERTULLUS D. BUTLER.

It is stipulated on behalf of the complainant and of the defendant, David Knab, in the above-entitled cause, that a discontinuance, without objection

on the part of said Knab, may be entered as to the said John J. Orton and Tertullus D. Butler, and that on the trial of the cause it shall be conceded that the said Knab held the premises in dispute in the cause, 1st, for his own security, and secondly, in trust for said Hubbard, or his assigns; that the George Smith is the legal assignee and owner of the interest of the said Hubbard, and is entitled to a decree securing said premises to him,
203 and that the said Knab consents to a decree (without making the said Smith a formal party to the proceedings) establishing the right and title of the said Smith on the said premises.

W. W. GRAHAM,
Sol'r for Def't Knab.

(Same time, to wit, Dec. 19, 1853, decree presented by complainant's solicitor and filed, but not signed by the court.)

Same time came the parties, by their solicitors, and this cause coming on for argument, and being submitted, the court holds the same under advisement.

December 22, 1853.—And now, at this day, the court being well and sufficiently advised of and concerning said cause, it is ordered and adjudged by the court that the bill filed in this cause be, and the same is hereby, dismissed for want of parties without prejudice, with costs to be taxed.

STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

I, Mathew Keenan, clerk of said court, hereby certify that I have compared the foregoing with the papers, pleadings, and record or docket entries in the above-entitled cause, that the same is a correct transcript therefrom and the whole thereof as it now remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 26th day of June, A. D. 1854.

[SEAL.] MATHEW KEENAN, *Clerk.*

204 *Copy decree of supreme court, Wis., in case of Orton vs. Knab.*

Defendant's testimony.

Be it remembered, that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, on the 12th day of December, A. D. 1854, on the 17th day of the term, to wit, on the 8th day of January, A. D. 1855, present, the Hon. Edward V. Whiton, chief justice, and the Hon. Abram D. Smith and the Hon. Samuel Crawford, associate justices of said court, the following proceedings were had *inter alia*, to wit:

State of Wisconsin, supreme court, December term, A. D. 1854.

JOHN J. ORTON, *complainant and appellant,*
vs.
DAVID KNAB, *defendant and appellee.*

This cause having been brought to argument and hearing, and the pleadings and proofs having been read, and the counsel of the complainant and defendant having been heard, and the court having duly considered the s'd pleadings, proofs, and arguments, and it appearing to this court that error was committed and injustice done by the final decree in this cause made by the circuit court of the county of Milwaukee, from which the appeal was taken to this court; and it further appearing that the pleadings and proofs

in said cause were ready for a final hearing in said circuit court at the time of said decree; and it further appearing that the terms and conditions of the bond and agreement made on the twenty-second day of July, in the year of our Lord one thousand eight hundred and forty-eight, by the said David Knab, the said defendant, to one Tertullus D. Butler and his
205 assigns at the time of the filing of the bill herein had been fully satisfied, and the said Knab discharged from all liability thereon by the said Butler and his assignee, and that said bond had been duly assigned by the said Butler to the said Orton, the said complainant, for a valuable consideration before the filing of said bill of complaint; and it further appearing that the said bond was conditioned that upon the performance of certain undertakings on the part of the said Butler and his assigns, the said Knab should convey to the said Butler or his assigns certain lots and parcels of land situated in the county of Milwaukee, in this State, described as follows, to wit: lots seven and eight, in section nine, in township seven, north of range twenty-two east, except three acres sold by Cyrus D. Davis before the execution of the said bond; and it further appearing that a good title can be made to said lands by the said defendant to the said complainant, and that said defendant has hitherto neglected and refused to make said conveyance when demanded by the said complainant: it is therefore ordered, adjudged, and decreed that the decree of the said circuit court herein dismissing the bill of the complainant with costs, be, and the same is hereby reversed, vacated, and annulled.

And it is further ordered and decreed that the said bond and agreement so made and entered into between the said Butler and the said Knab, and assigned to the said complainant, and duly proven in this cause, be specifically performed. And it is further ordered and decreed that within twenty days after service upon him of a copy of this decree, the said David Knab shall, by a good and sufficient deed of conveyance, release, convey,
206 and confirm to the said complainant, John J. Orton, all the right, title, and interest which he, the said Knab, had in the said land at the time of the execution of the said bond, described in said bond as lots seven and eight, section nine, in township seven, north of range twenty-two east, except three acres theretofore sold by Cyrus D. Davis, and that the said deed of conveyance from the said David Knab to the said John J. Orton shall contain proper and suitable covenants from the said David Knab, as against all claims and incumbrances by, through, or under him, the said Knab, whereby the said lands and premises may or might be incumbered or the title thereto impaired.

And it is further ordered and decreed that in case the said complainant and the said defendant do not agree upon the form and the covenants of said deed in conformity with this decree, then, and in that case, Henry L. Palmer, esq., of the city of Milwaukee, be, and he is hereby, appointed a special commissioner of this court to settle the same; and in case the said Knab shall neglect or refuse to execute and deliver to the said complainant, John J. Orton, the aforesaid deed of conveyance and confirmation within twenty days from the time of service upon him of a copy of this decree, then, and in that case, the said Henry L Palmer, esq., be, and he hereby is, appointed a special commissioner of this court, and as such he is hereby authorized, empowered, and required, on behalf and in the name of said Knab, to execute and deliver to the said complainant, John J. Orton, a sufficient deed of conveyance in fee of the lands and premises before described, with the covenants herein before mentioned, on behalf of the said Knab, and said conveyance, so made, executed, and delivered by the said Henry L.
207 Palmer, esq., to the said complainant, shall have the same force and like effect to convey, assure, and confirm the title to said lands and

premises in and to the said complainant as though said conveyance were made, executed, and delivered by the said David Knab by his own hand and in his own proper person, and the said David Knab, and all and every person or persons claiming or to claim by, through, or under him, be forever barred from setting up any claim, right, title, or interest in or to said lands or premises. And it is further ordered and decreed that upon the execution of said deed as aforesaid, either by the said David Knab or by the said commissioner, the said Knab, and all others holding under, by, or through him, shall immediately quit and deliver possession of the said lands and premises to the said complainant. And it is further ordered and decreed that the said defendant do pay to the said complainant the costs of this suit in this court and in the circuit court of Milwaukee county, to be taxed, and that he have execution therefor.

Dated January 8th, 1855.

By the court:

EDWARD V. WHITON,
Chief Justice.

Deed of Knab to Orton.

Deed in chancery.—David Knab to John J. Orton.

This indenture made the fifteenth day of March, A. D. 1855, between David Knab, by Henry L. Palmer, commissioner, of the first part, and John J. Orton, of the second part: Whereas at a term of the supreme court of the State of Wisconsin, held at Madison, the seat of government of
208 said State, on the second Tuesday, to wit, on the twelfth day of December, A. D. 1854, on the seventeenth day of the term, to wit, on the eighth day of January, A. D. 1855, it was, among other things, ordered, adjudged, and decreed by the said court, in a certain cause therein depending, wherein John J. Orton was complainant and appellant, and David Knab was defendant and appellee, that the said David Knab should, within twenty days after service upon him of a copy of said decree, by a good and sufficient deed of conveyance, release, convey, and confirm unto the said complainant, Orton, all the right, title, and interest which the said Knab had at the time of the execution of a certain bond in said decree mentioned in and to lots No. seven and eight, in section No. nine, in township No. seven, north of range No. twenty-two east, except three acres theretofore conveyed by Cyrus D. Davis, with proper covenants against all incumbrances by, through, or under him, the said Knab; that in case said Knab should neglect or refuse to execute and deliver such conveyance and confirmation within twenty days after service on him of a copy of such decree, that then, and in that case, the said Henry L. Palmer, esq., of the city of Milwaukee, who was by such decree duly appointed a special commissioner of said court for that purpose, and was thereby duly authorized, empowered, and required, on behalf and in the name of the said Knab, to execute such deed of conveyance to the said complainant, should, in the name and on the behalf of the said David Knab, execute and deliver to the said complainant a good and sufficient deed of conveyance of the lands and premises aforesaid, with the covenants aforesaid, and that said conveyance, so made and exe-
209 cuted by the said commissioner to said complainant, should convey, assure, and affirm the title to the said premises to said complainant, Orton, in the same manner and to the same extent as if said deed had been executed and delivered to the said complainant, Orton, by the said defendant, Knab, in his own proper person; and whereas it hath appeared to me, said Henry L. Palmer, commissioner as aforesaid, by the affidavit of

E. Mariner, taken and filed in this cause, that a copy of said decree was served on said Knab on the 26th day of January, A. D. 1855, and that said Knab refused to execute a deed containing any covenants whatever, and that more than twenty days have elapsed since the service of such copy of said decree, and that said Knab has wholly neglected and refused to execute and deliver such deed to said complainant, Orton:

Now, therefore, this indenture witnesseth that the said David Knab, by Henry L. Palmer, esq., of the city of Milwaukee, commissioner under and by virtue of the decree aforesaid, in consideration of the premises and of the condition of the said bond, has granted, bargained, sold, released, and confirmed, and by these presents does grant, bargain, sell, release, and confirm, to the said John J. Orton, to his heirs and assigns, the following described real estate, to wit: lots No. seven and eight, in section No. nine, in township No. seven north, of range No. twenty-two east, except three acres heretofore sold by Cyrus D. Davis, together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, to have and to hold the said premises to the said party of the second part, his heirs and assigns, forever. And the said party of the first part, for himself, his heirs, executors, administrators, and assigns,
210 doth covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that the above bargained premises, at the date of the ensealing of these presents, are free and clear of and from all claims and incumbrances whatsoever suffered by, through, or under the said party of the first part, and that the said premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim by, through, or under the said party of the first part, his heirs or assigns, he will forever warrant and defend.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

DAVID KNABP, [L. S.]
By H. L. PAMMER,
Special Commissioner. [SEAL.]

Signed, sealed, and delivered in presence of—
E. MARINER.
MOSES KEENLAND.

STATE OF WISCONSIN,
Milwaukee County, ss:

This sixteenth day of March, A. D. 1855, before me came the said Henry L. Palmer, commissioner, to me known to be the person who executed the above deed, and acknowledged that he executed the same, in the name and on the behalf of the said David Knab, freely and voluntarily, for the uses and purposes therein mentioned.

E. MARINER,
Notary Public, State of Wisconsin, Milwaukee Co.

Received for record March 21st, A. D. 1855, at 5½ o'cl'k p. m., and recorded in vol. 46 of Deeds, on pages 310 and 311.

CHARLES J. KERN,
Register, Milw. Co., Wis'n.

211 *Deposition of Nathan Pereless.*

Testimony taken in open court for def't.

SEPT. 14, 1863.

Defendant offers to take the testimony of Nathan Pereless in open court. (Objected to by pl'ff.)

1. Because the time for taking testimony in this case is elapsed.

2. On the hearing the party has no right to take oral testimony.

Nathan Pereless, sworn in open court, says: I did know Otis Hubbard. He resided in the second ward of the city of Milwaukee. I resided in the same ward. I knew David Knab from the year eighteen hundred and forty-eight. He resided in the same ward. He kept a store in that ward, on lot 1, block 42, second ward, on Chestnut street, between Third and Fourth streets. I did business on the same lot and block in the year 1849, commencing in July, 1849. Before that I did business in Third street, about three hundred feet from the Chestnut. I do not know that Otis Hubbard had any business, except that he was the owner of real estate, and drinking whiskey. He spent much of his time on those corners. Knab kept spirituous liquors to sell at his store as part of his stock, and he retailed it.

(To this the complainant objects as irrelevant.)

I think Hubbard was, as a business man, shrewd, according to my impression. I saw him most of the time drunk; he was generally drunk. I think when sober he was smart and quick. I do not remember to have seen him and Knab much together.

Cross-ex'd.

I could not tell how many times I have seen Otis Hubbard sober.
212 I may have seen him ten or fifteen times sober. I do not think I have seen him more than fifteen times sober. I knew him three or four years, from the year 1847 until he died. He was generally under the influence of liquor when I saw him. He went round making speeches drunk. He was noisy when drunk.

I have known David Knab since the year 1847. He has always borne the character for probity and property. There is no more honest man in the second ward. I have seen Otis Hubbard drunk at least one hundred times. He was not then stupid. He said sharp things.

Deposition of Alexander Mitchell.

GEORGE SMITH
vs
JOHN J. ORTON.

SEPT. 25, 1863.

Alexander Mitchell, sworn as a witness in open court on part of defendant, (the same objections being made to his testimony as to the other witnesses,) testified:

In the year 1850 I resided in Milwaukee; George Smith resided in Chicago at that time. I attended to his business. I knew Joachim Gruenhagen. Recollect a purchase of property made by James S. Brown of Gruenhagen, but do not recollect the date. I think it was conveyed to James S. Brown.

Question. For whose benefit was the estate conveyed?

(Objected to by comp't as irrelevant, and not evidence to prove by parol a trust, or an interest in another.)

And the cause must be tried on the pleadings.

Defendant's offer is overruled.

Witness. I know there was litigation in the circuit court between
213 John J. Orton and Knab, but do not recollect the particulars, it is so long since. I cannot tell when the conveyance was made by Brown to Smith. That litigation was before the deed of Gruenhagen to Brown.

(Complainant objects that parol evidence is not competent, that records show the dates.)

Def't asks witness who acted for Smith about the conveyance of the lots by Brown to Smith?

(Objected to as irrelevant and immaterial. Objection overruled.)

Answer. I did.

What consideration was paid by Smith to Brown, or was there any?

(Objected to as irrelevant, the deed showing a nominal consideration. The question is overruled.)

Question. Did Smith direct you to make the purchase?

(Objected to by complainant as immaterial, and the prosecution of the suit is a ratification of the agent's acts. Offer rejected.)

Question. Did you act for Smith in the litigation in the circuit court?

(Objected to as immaterial, and the records of the cases will show who were the parties and concerned in the litigation, and it does not appear that the witness acted for any person in the litigation.)

Witness. I did not pay any attention to the matter; I left it with Brown and Ogden; I employed them for Smith; I do not recollect that I did immediately; I mentioned it to him afterwards at Washington.

Def't offers to show the nature of the communication or its substance.

(Offer overruled.)

214 Question. At the time of the bringing of this present suit, who were the parties in interest actually and beneficially?

(Objected to by complainant.)

1 Because it calls for a legal opinion of the witness.

2 Cannot be proven by parol.

Deposition of Jeremiah B. Selby, jr.

GEORGE SMITH
vs.
JOHN J. ORTON.

SEPT. 25, 1863.

Jeremiah B. Selby, jr., being duly sworn in open court on behalf of the complainant: I know Otis Hubbard in his lifetime, from 1843, to the time of his death; he resided all that time in the city of Milwaukee.

What were his habits as to sobriety?

He was very intemperate. I should think that he was in a state of intoxication as much as four days out of seven; he was, I should think, half of the time, and a little more, in a state of mental derangement, occasioned by drinking. He would sometimes get on a spree, which would last him a couple of weeks; then his system would get so deranged that he would break off. I am a physician; I attended him in his last illness. I should think that during the latter part of his life he was greatly injured in his capacities, mental and physical.

Cross-examination.

Otis Hubbard died in the year 1851 or 1852. I think in the fall of 1851. I knew Hubbard in 1848.

215 Was Otis Hubbard's mind seriously impaired in 1848?

Ans. I think it was.

To what extent?

I don't know that I can express the derangement. When he was drunk he was very much deranged. In the year 1848, and a number of years before he died, he was silly, foolish, and stupid. When off a drunken spree, he appeared very depressed. After he got over a spree he was capable of doing business, but not the capability that was in men of ordinary capacity. I do not know that I can tell how he lacked capacity. He did not seem to close up transactions.

Deposition of James B. Cross.

GEORGE SMITH
vs.
JOHN J. ORTON.

SEPT. 25, 1863.

James B. Cross sworn in open court on part of defendant: I knew Otis Hubbard for several years before his death; knew him well. He was a peculiar kind of a man in many respects. I was satisfied he knew more than he pretended to. He was one of that kind of men that was shrewder than he seemed to be.

Question. Whether he would or would not do business when intoxicated? (Objected to by complainant.)

Answer. He had a peculiarity in that respect. A person could not talk with him about business when he was intoxicated. He seemed more
216 cautious when intoxicated. He would then talk all round, and one could not drive a bargain with him. I do not know that his mind was seriously impaired in the year 1848. He drank too much. He seemed bright when he was drunk. He almost always appeared under the influence of liquor. I knew Tertullus D. Butler in the year 1848. I do not think that, in the year 1848, Otis Hubbard's mind was so impaired that Butler could impose on him. I think Hubbard was the smartest man of the two.

Cross-ex'd.

Hubbard was under the influence of liquor one-half the time. Almost every time I saw him he was under the influence of liquor, more or less. I have seen him standing on the sidewalk crying or making speeches to the moon. He consulted me as attorney three or four times. Have seen him very often. As a general thing he was under the influence of liquor. His conduct and language was affected by his drinking.

Above testimony of James B. Cross taken subject to the objections.

217 *Deposition of James S. Brown.*

GEORGE SMITH
vs.
JOHN J. ORTON.

SEPT. 25, 1863.

Def't called James S. Brown to testify on his behalf, which was objected to by complainant.

1. That testimony could not be taken in open court at the hearing, and time for taking testimony had expired.

2. By the rules of the court the oral testimony should have been taken before the hearing.

The court concluded to take the testimony, and submit the question to the Supreme Court in case of an appeal.

James S. Brown sworn: In the year 1850 I was a practicing lawyer, in the circuit court of Milwaukie county, and a solicitor in chancery. That

court was a court of general chancery jurisdiction. The practice was the same as other chancery courts, and many of the rules were borrowed from the rules of circuit courts of the United States, as near as can be recollected, and some from the New York courts before the code. So far as the rules for administering justice, there was but little difference between the courts of this State and of New York and other States. The minor difference in practice grew chiefly out of the difference in the construction of the courts. The circuit courts had rules for enforcing their jurisdiction.

I appeared as solicitor for complainant in the case of Hubbard *vs.* Knab, Orton, and Butler, in the circuit court of Milwaukee county. In the
218. case I appeared first as counsel with Mr. Jenkins, and afterwards Brown and Ogden were substituted as solicitors, as appears by the record. In the case of Orton *vs.* Knab I did not originally appear in the case of record. In a subsequent case, after the answer was filed, act in the case in behalf of the defence. Except by reference to the record, I cannot state the time I assumed the control of the suit of Hubbard *vs.* Knab, Orton, and Butler. And I do not know of any person controlling the case after the answer was filed. All the knowledge I have now is from the record. Looking at the record I do not see that any act was done after December first, 1852, until Brown and Ogden were substituted, and I presume that nothing was done.

In the case of Orton *vs.* Knab, it would be difficult for me to state the first act I did, or state the time, it is so long since. I do not recollect anything being done in behalf of defence in the circuit court by any solicitor, except myself, after the case was at issue. I attended to taking most of the testimony on behalf of the defence, and no other solicitor. Whatever argument was had was by myself, at the final hearing in the circuit court. I think I prepared the brief for the Supreme Court, and I think Mr. Ryan argued it. In the first instance I was retained by Otis Hubbard, and that time I knew nothing of the transactions between Hubbard and Gruenhagen. In the case Hubbard *vs.* Orton and Knab I appeared for Lapham, without looking to him for pay, with the sole view of protecting the property and interest I am now seeking to protect here. I acted with a view
219 of looking to George Smith, and him alone. I considered George Smith as my real client in those cases, and retained by him. Lapham merely assented to the use of my name for George Smith. Lapham never employed me, or solicited me to act in his behalf. He consented to the use of my name for George Smith. Lapham was complainant, holding the bond of Gruenhagen for a certain amount of money. The transaction between Lapham and myself, I think, I was acting for George Smith, but it might have been before that time when I was interested. Lapham agreed to receive a sum of money smaller than the amount of the mortgage of Gruenhagen to Hubbard, and to give control to myself over that suit, upon condition of being released from the requirements of the mortgage, which were that Hubbard should free the title.

Upon reflection I am at present impressed that Lapham still employed me as counsel, after he was substituted. Afterwards in acting for George Smith, I acted for Lapham after he revived the suit. I was not employed by Lapham as solicitor.

In the case of Orton *vs.* Knab I was first retained by Otis Hubbard after he commenced his suit. I do not think anything was done by me in that suit, until I took some testimony in it. My impression, I first commenced acting in that case after the cause was at issue, and after the sale by me for George Smith. The first thing that was done was in the fall of 1853.

I first acted in that case (Orton *vs.* Knab) under the following arrange-

ment with Knab, as nearly as I can now recollect, a transaction so
220 long past, to wit:

I acting for George Smith, agreed with Knab that I might proceed and take testimony in the case in his (Knab's) name in behalf of the defence, but for the benefit of George Smith, and that for such purpose I might have a partial control over the case, (he, Knab,) retaining Graham for his own protection; that in consideration thereof, he (Knab) should be protected against all costs of the suit accruing, or to accrue, and that I should not look to Knab for compensation.

There might have been some other conditions, but the above is the substance as nearly as I can recollect. I accordingly acted in the case in the circuit court on the record as for Knab, but really not on his retainer, and for the interest represented by the complainant George Smith.

My impression is, that the conveyance to Smith was at or about the time of this arrangement, and I think was part of it. Knab gave me the entire control, except so far as Mr. Graham, his solicitor, might desire to interfere for his Knab's protection. I think the stipulation on file in the case of Hubbard *vs.* Orton, Knab, and Butler was part of the same arrangement.

The thing against which Knab desired protection was his becoming in any manner personally liable, and in the absence of interference I understood I was to have control of the case.

I do not recollect that Mr. Graham or Knab in any manner ever interferred in the prosecution of that case. I took the conduct of the case
221 from that time on until it was disposed of in the circuit court. Mr. Ryan acted for me in arguing the case in the Supreme Court.

Cross-examination.

I notice, in hearing my answer as to the arrangement with Lapham read, that it is not quite correctly taken. Premising as before, that I speak with some hesitation as to particulars, because the transaction is so old, but as nearly as I can recollect, it was as follows:

I had been continued as counsel by Lapham after the death of Hubbard. Afterwards, when George Smith became interested through my deed to him, acting in his behalf, I agreed with Lapham, as administrator of Hubbard, to pay a sum less than the mortgage of Gruenhagen to Hubbard in satisfaction thereof, to release the estate from its obligation to clear the title to the premises in dispute, to assume the litigation with Orton and Hubbard at the risk and cost of parties whom I represent; that said Lapham should allow his name to be used, and also would request both Davis and Knab to convey to Smith, as the representative of the interest of Hubbard. It was under this arrangement that I afterwards acted. The money was paid, although, I think, not by me personally.

Question. In the case of Orton *vs.* Knab, in the arrangement between you and Knab, was the purpose of your intervention in that suit express; and what was the reason for your intervention?

(Objected to.)

I am distinct and clear in my recollection as to what the reason
222 actually was, and I think it was discussed with or spoken of to Knab as follows: I had complained that the answer filed by Knab did not distinctly enough state the facts, and that it admitted what was untrue, and that under the answer no proper issue was formed. My desire was, by proving the interest of Smith in the transaction, to compel the complainant to make him a party, so that, through his answer, the true and proper issue might be raised, or to compel a dismissal of the suit for want of parties. I did not believe that in the suit Knab had raised an issue under which the rights of the parties could be properly litigated.

Question. Was it understood between you and Knab that you should appear in the case in the name of George Smith, and did you ever, in fact, make an appearance in his name? What was the purpose for which you appeared?

(Objected to.)

Answer. It was not understood that I should appear in his name, but, on the contrary, that I should act for Knab; the purpose for which I intervened in the cause was to compel the complainant to make George Smith a party, and so to prove want of interest in Knab, and an interest in Smith, that the court would, in absence of Smith, dismiss the cause. I did not believe that the answer of Knab admitted of a trial of the merits. I did not appear in the name of Smith.

Direct resumed.

Did you, as a matter of fact, in that case, prove any interest in Smith?

223 Answer. I think I did.

Q. How did you prove it?

Answer. By the proof filed in the cause.

Question. What proof on file in the cause shows that?

Ans. My answer must be a matter of judgment, but think the proof copied into the record filed by you completely establishes that fact.

Quest. How does it appear that Smith had any interest in that case by proofs on file?

Answer. I gave the above answer under the supposition that the deeds used in the trial of Orton *vs.* Knab were copied into the record filed by you. I have not read your copy. I will not state positively, but I think, and have little doubt of the fact, that those deeds were used at the trial of that cause. By the practice of the State court, it is the custom to produce such documents at the hearing in chancery as at a trial at law. I think that formed one of the grounds in the circuit court of a dismissal of the cause. I mean the absence of Smith as a party formed such ground.

Question. You have a bundle of papers in case of Orton *vs.* Knab with you and your brief in the supreme court. Will you examine them and see whether it is anywhere suggested that George Smith should be a party to that suit?

Ans. I have not my brief in that case here, and the other papers are too voluminous to read through, but from glancing at their endorsements, I see none that would be likely to contain any such suggestion.

224 In what manner was suggested, at the time of your agreement with Knab, that he could become personally liable in case of Orton *vs.* Knab?

My impression is that there was no suggestion at the time made as to how he could be made liable, but that it was rather a vague fear on the part of Knab than a ground suggested by his attorney.

Here is the brief and the points of the appellee in the case of Orton *vs.* Knab. Will you see if it is there that Smith should have been a party to that suit?

Yes; it is so asserted in my brief, as follows: "The bill is defective for want of parties. Will the court make a decree affecting the rights of Hubbard, the *cestui que* trust, or his vendees, without compelling the defendant to make them parties? On the hearing it was shown that Hubbard conveyed his rights to purchasers, and that George Smith now holds as vendee both of Davis and Hubbard." I wish to add that I have, since answering the questions as to my appearance as solicitor in the case of Orton *vs.* Knab, seen a notice of trial in the supreme court of Wisconsin, directed by

the complainant to Graham, as solicitor for the defendant, showing that the complainant at that time regarded Graham as solicitor for defendant, and I may be mistaken in my memory of the extent to which I appear, but I do know, and state positively, that I took testimony in the case, and that almost the sole object of so doing was to force the complainant to make additional parties, so that the true issue, as I regarded it, might be made and tried.

Question by defendant. Was that notice a notice of trial?

Yes; and by the rule of the supreme court, if I rightfully recollect, it is required that such notice be served upon the att'y of record in the court below.

Question.

Answer. It would be of no avail, even though I had conducted the case below, to serve it upon me, unless I were att'y of record.

Order of court as to testimony.

Sept. 25, 1863.—Ordered by the court, that the testimony taken at this hearing, in open court, of the witnesses, James S. Brown, James B. Cross, Jeremiah B. Selby, Nathan Pereles, and Alexander Mitchell, be disallowed as evidence in the cause, the same not having been taken by depositions, according to the rules of court. All the said testimony was taken subject to this objection and to the objection as to its relevancy. In case of an appeal, it is ordered that it be included in the transcript of the case for the disposition of the supreme court. All the other testimony offered on both sides is admitted as part of the case.

By the court.

Decree of dismissal.

And now at this same term, to wit, July term, 1863, and on the thirty-first day thereof, to wit, on the sixth day of October, A. D. 1863, the following proceedings were had, to wit:

GEORGE SMITH
vs. } In equity.
JOHN J. ORTON.

On consideration of the pleadings and proofs in this cause, and of the arguments of counsel, it is therefore ordered, adjudged, and decreed by the court that the complainant's bill of complaint be, and hereby is, dismissed at the costs of the complainant to be taxed.

A. G. MILLER.

Appeal.

And came the complainant, by his counsel, and prayed an appeal to the Supreme Court of the United States. Whereupon it is ordered by the court that an appeal be, and hereby is, allowed the complainant to give an appeal bond, with surety, to be approved by the court or judge in the penalty of two hundred and fifty dollars, conditioned to pay costs, &c.

October 30, 1863. Appeal bond with James S. Brown and D. Ferguson as sureties, approved by the district judge, filed as follows:

Appeal bond.

Know all men by these presents, that we, James S. Brown and David Ferguson, as sureties for George Smith, are held and firmly bound unto John J. Orton, in the sum of two hundred and fifty dollars, to be paid

227 unto the said John J. Orton, his executors and administrators, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this twentieth day of October, in the year eighteen hundred and sixty-three.

Whereas the above-named George Smith hath appealed to the Supreme Court of the United States to reverse a decree made by the circuit court of United States for the district of Wisconsin in a certain suit, wherein the said George Smith was complainant, and the said John J. Orton was defendant: now, therefore, the condition of this obligation is such that if the above-named George Smith shall prosecute his said appeal to effect, and answer all costs if he should fail to reverse said decree, then his obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES S. BROWN. [SEAL.]
D. FERGUSON. [SEAL.]

Oct. 30, 1863, bond approved.

A. G. MILLER, *Dis. Judge.*

And citation issued as follows:

The United States of America to John J. Orton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Wisconsin, George Smith is appellant, and you are appellee, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, this thirteenth day of October, A. D. 1863, and of our independence the eighty-eighth.

A. G. MILLER, *District Judge.*

I hereby accept due service of the above citation this 31st October, 1853.

E. MARINER,
Solicitor for J. J. Orton.

229 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, John M. Miller, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office, being a full and complete exemplification of the record and procedings in the suit of George Smith against John J. Orton.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in the [SEAL.] said district of Wisconsin, this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty three, and of the independence of the said United States the eighty-eighth.

[U. S. Revenue Stamp, 5 cents.]

J. M. MILLER, *Clerk.*

Filed 1st December, 1863.

a

Supreme Court of the United States.

DECEMBER TERM, 1864.

GEORGE SMITH,

VS.

JOHN J. ORTON.

STATEMENT AND BRIEF.

JAS. S. BROWN,
Attorney and of Counsel for Appellant.

McGILL & WITHROW, Printers & Stereotypers, Washington, D.C.

Supreme Court of the United States.

DECEMBER TERM, 1864.

GEORGE SMITH

vs.

JOHN J. ORTON.

STATEMENT AND BRIEF.

This case has once before been in this Court upon bill and demurrer, and the decision sustaining the bill is reported in 21 Howard, p. 241.

It is now here for adjudication on bill, answer, replication, and proofs; the latter, as we shall hereafter show, substantially sustaining the allegations of the bill. The bill sets forth that on the 14th day of July, 1848, one Cyrus D. Davis was seized in fee simple of the legal estate in certain premises, in trust, however, for Otis Hubbard, (since deceased;) that the said Hubbard likewise claims the beneficial interest in lots 5 and 6, in block No. 43, in the city of Milwaukee, and on the solicitation of one Butler (who was a connexion) made an arrangement with one Joseph Schram to sell to him said lots; that the said Hubbard, although legally capable of transacting business, was injured in mind by age and habitual intemperance, and could easily be cheated by one in whom he had confidence; that he had great confidence in Butler, as a friend and family connection, and desired to sell the lots in consequence of his advice, and trusted the entire management of the sale to him, (Butler;) that said Schram was

to pay one thousand dollars, but refused to advance any money without either a sufficient deed or security therefor; that the legal title to said lots was in certain relatives of the said Hubbard residing out of the State of Wisconsin; that said Butler, being anxious to use a portion of the money in his own business, proposed to secure Schram, and induced Hubbard to speak to one David Knab and ask him to give security for the said Hubbard; that the said Hubbard proposed to the said Knab to secure him by the said premises now in question; that the said Butler also spoke to Knab on the subject, and the latter consented to sign the bond with Butler upon receiving such security; that on the 21st day of July, 1848, Hubbard applied to Davis for a deed of said premises running to Knab; that Davis, on account of the request and of the ownership of Hubbard, and for no other consideration, executed a deed of the premises to Knab and delivered it to Hubbard; that on the 22d day of July, Knab, at the request of Butler, went to the office of Hemenway, Ripley & Wells, and there, with Butler, executed a bond binding themselves to procure within three months a good title to said lots in block 43 to themselves, and convey the same to Schram by deed, with covenants of warranty, Schram executing a mortgage thereon for $350 as by by reference to a copy of said bond appended to the bill and marked "A" will more fully appear; that said deed from Davis was then delivered to Knab, and he executed an instrument in writing bearing date on the 22d of July, (a copy of which is appended to the bill and marked "B,") by which he bound himself to the said Butler in the penal sum of two thousand dollars; that upon the performance by Butler, at his own cost and charge, of all and singular the agreements of Butler and Knab in the bond to Schram (except as to the deed from Butler and Knab,) he (Knab) would convey the premises here in question to Butler, (it being recited in the instrument that Knab was surety for Butler on the bond to Schram.)

That Knab signed the instrument without knowing its contents or that it ran to Butler, and without any previous understanding to that effect, but at the request of Butler, and supposing that the papers were all properly drawn; that he never acknowledged the instrument except by signing it in the presence of a notary public there present; that neither did Knab pay anything to Davis for his deed, nor did Butler pay anything to Knab, the latter claiming at no time any ther interest in the premises than by the way of security;

that under the statutes of the Territory of Wisconsin, then in force in the State, the deed of Davis to Knab and the bond of Knab to Butler together constituted Knab simply mortgagee of the premises, to secure him against his liability on his bond to Schram, and that the equity of redemption was in Davis by virtue of his prior legal, and in Hubbard by virtue of his equitable title, so that Butler, independently of the fraud, did not and could not acquire any right to said premises; that Knab left the two instruments signed by him on the table, and recorded the conveyance to him in the office of the register as a deed and not as a mortgage; that Hubbard was not present during the transaction, and Knab never delivered the two instruments signed by him, or, until long subsequently, knew what became of them; that Schram then paid to Butler five hundred dollars, part of the consideration money for the lots in block 43; that Butler never recorded the bond from Knab to himself, and Hubbard remained in ignorance of its existence until a period long subsequent, having been induced to believe that Knab, who was known to him (said Hubbard) as a man of honor and integrity, in whose word for the re-conveyance of said lot implicit credit and reliance could be placed, had not given any instrument for the re-conveyance of the same.

That Butler never fulfilled the condition of the bond from Knab to himself, or of himself and Knab to Schram, but that Hubbard, more than a year after the time limited in the bond to Schram, procured from his trustees a title to himself and conveyed the lots in block 43 to Schram, and that neither Butler or Knab ever had any interest in the same or conveyed any to Schram; that for a long time after this latter conveyance the lots remained subject to the lien of a judgment against Hubbard; and Schram held the bond of Butler and Knab for more than two years with its conditions unperformed, and its penalty forfeited, and with full right of action thereon against Knab; that after the assignment from Butler to Orton, hereinafter mentioned, Orton, either by indemnifying Schram or in some other way, procured from Schram an assignment of the bond given to him by Butler and Knab; that on the 14th of March, 1851, Butler executed to Orton an assignment of the instrument in writing signed by Knab and running to him, (Butler,) and acknowledged the same; that Orton immediately thereafter caused the bond and assignment to be recorded among the deeds; that Butler, throughout all these transactions, acted fraudulently, violating the trust reposed in him by Hubbard as a friend,

a connexion, and an agent, and taking advantage of the mental weakness of Hubbard for the purpose of defrauding him; that as against Hubbard and Knab the instrument assigned to Orton was a nullity; that on the 7th day of June, 1851, Hubbard still having the beneficial interest in the premises in dispute, for a good and valuable consideration, executed a sufficient deed of said premises to Joachim Gruenhagen, by which the latter became seized in fee simple of the entire estate of said Hubbard; that Gruenhagen, on the 31st of December, 1852, conveyed the same to one James S. Brown, who subsequently, for a valuable consideration, conveyed to the complainant; that afterwards, on the 1st day of February, A. D., 1853, the said Davis, at the request of the administrator of Hubbard, then deceased, and because the complainant was grantee as aforesaid, with the right to control and dispose of the entire estate of said Davis in the premises, conveyed to the complainant all his title and interest; that Hubbard, in his lifetime, being ignorant of the bond to Butler and desirous of relieving his surety, Knab, conveyed to Schram said lots in block 43, and that all judgment liens upon said premises not paid off by Hubbard in his lifetime, were paid off by his administrator, and partly out of funds received from the grantors of the complainant on account of said premises; that Hubbard, after being informed as to said bond to Butler and assignment to Orton; and after his said sale to Gruenhagen, did, for the purpose of avoiding any defence which might be made by Gruenhagen to the payment of a part of the consideration money, and by arrangement with Gruenhagen, file a bill in the Circuit Court of Milwaukee county against Butler and Orton, praying an injunction against any conveyance to Orton, and also for a conveyance from Knab to the complainant (Hubbard); which (preliminary) injunction was allowed; that within a few days thereafter Orton filed a bill in the same Court against Knab alone, claiming that Knab was the owner in fee of said premises, and that Butler as purchaser from Knab obtained said bond, and that Butler and Orton had fulfilled the conditions of said bond and performed the consideration mentioned therein, for which Knab had agreed to convey, and not claiming for himself (Orton) or Butler, any other right in said premises than as purchasers by means of said bond from Knab as owner, nor claiming that any other consideration was paid or given to Knab; that Knab filed an answer, not setting up any specific defence, but simply alleging that he held the title as the proerty of Hubbard

only by the way of security to protect himself against the contract with Schram; that he had received notice from Hubbard not to convey to Butler, and did not himself care to whom he conveyed it, but prayed that Hubbard might be made a party, &c.; that the suit of Hubbard against Orton and Knab was, after his death, discontinued, because he had conveyed the premises to Gruenhagen as aforesaid before commencing it, and no testimony was ever taken in it; that in the suit of Orton *vs.* Knab, the complainant induced Knab to take testimony as to his interest, for the purpose of forcing Orton to make the complainant (Smith) a party, so that a proper defence and proper pleadings might be put in in said suit; that said Orton would not make the complainant or any assignee or representative of Hubbard a party, but forced the case to a hearing on the pleadings as they stood, without any party in interest being party to the defence; that while said suit of Orton was pending, the right of the complainant to demand a deed from Knab became perfect by the release of Knab, through Hubbard's administrators and grantees of title as aforesaid, from liability to Schram, and that right could not be defeated or affected by the *ex parte* action of Orton in filing a bill against Knab and making him alone a party; that Knab was not enjoined in that suit from conveying to the complainant, and by refusing to convey would have made himself liable to be sued by the complainant to compel a deed; that Knab for these reasons, and because he acknowledged the verbal agreement to reconvey to Hubbard upon his release from liability to Schram, did on the first of February, 1853, convey said premises to the complainant; that subsequently, in the fall of 1853, the case of Orton *vs.* Knab was dismissed upon the hearing, for want of a party in interest as defendant; that upon such dismissal the complainant became, by virtue of his title derived from Hubbard and the deed from Knab, the absolute owner of said property, with full right to sell and convey the same, and his title could not be defeated by proceedings between third persons to which he was not a party; that about sixty days after the dismissal of said suit and the completion of the title of the complainant as aforesaid, Orton commenced proceedings by way of appeal from the dismissal in the Supreme Court against Knab as sole appellee and party defendant; that in the month of September, 1854, the Supreme Court entered a decree reversing the order of the Court below, and directing Knab, or, on his refusal, one H. L. Palmer for him, to execute a conveyance of the premises; that said

Court, among other things, assigned as a reason for said reversal, that Knab had no interest in the defence of fraud, and having acknowledged in his answer that his interest in the premises themselves, by the way of security, had been satisfied, it did not concern him whether the complainant and Butler had practiced a fraud upon said Hubbard or not; that Palmer upon the refusal of Knab did execute a deed of the premises to Orton, that the premises are, and for two years past have been unoccupied, and that the possession of the same is in the law in the party having the legal title, and that they are of the value of ten thousand dollars or more; that the proceedings of Orton against Knab alone were a fraud upon the complainant, and those under whom he claims; that if any portion of the legal title in the premises passed to Orton by the deed of Palmer, it was in trust for the complainant and subject to his rights, (as purchaser from Hubbard and Davis,) against both Butler and Knab; that by the proceedings, Orton acquired no other or greater rights than those of Butler or than Knab; that Butler receiving a deed from Knab voluntarily would have been merely trustee for those under whom complainant claims, and that his grantee, Orton, is in no better position; that Orton was a lawyer and had examined the records, and knew that Butler had performed none of the conditions of the bond upon which his rights depended; that, on the contrary, all the consideration mentioned for the conveyance to Butler had moved from Hubbard; that Orton now claims to be owner of the premises, and that complainant has no rights in same, either legal or equitable; that plaintiff has been injured thereby and prevented from selling, &c.

The prayer of the bill is that Orton be directed to release all claims, &c.; also prayer for general relief.

To this bill the defendant demurred; for the causes the Court is referred to the demurrer in the printed case.

The Court below sustained the demurrer on the ground of the allegation that no one was in the *actual occupation* of the premises, holding that actual *occupation* was necessary to sustain the bill.

An appeal was taken to this court and the bill was sustained, and the judgment of the court below was reversed.

After the case was remitted to court below on the order of this court overruling the demurrer, to wit: on the 3d day of October, 1859, an order was entered directing an answer by the first Monday of November; and on the 9th day of November, the defendant filed his answer, as follows:

1. Admitting the title of Davis in the premises, but denying that he held them subject to a *valid* trust, and alleging that if he did so hold them, it was for the purpose of cheating the creditors of Hubbard. Record, p. 13.

2. Alleging that Butler, under whom defendant claims, purchased of Hubbard. Record, p. 14, f. 30.

3. Admitting the sale of Hubbard to Schram of the lots in block 43, but denying that it was, at the request of Butler or that Butler was connected with it, *except procuring sureties and to attend to the execution of the papers.* P. 13, f. 29 and 30.

4. Acknowledging the execution of the deed by Davis and its delivery to Butler at the *request* of *Hubbard*, but denying its delivery to Hubbard. P. 13, f. 30.

5. Denying, on information and belief, that Knab was ignorant of the nature of the bond when he signed it.

6. Alleging on belief that Butler procured conveyancies of the title of persons in New York, and Hubbard the remainder.

7. That he had removed a part of the incumbrances, and indemnified Schram for the remainder; but not stating what part he removed or what incumbrances he indemnified against.

8. That he purchased the *bond* of Butler about the 22d day of January, 1851, for the sum of $2,100, paid to Butler *at* or *about* the date, except a *portion* thereof expended in complying with the condition of the bond to Schram; that *he* caused bond and assignment to be recorded; that at the date of said purchase the title of said lots was of record in *Knab, free and unincumbered;* that he did not know that Hubbard claimed an interest; that he purchased said bonds, satisfied SOME of the incumbrances against the lots 5 and 6 in block 43, indemnified Schram against the remainder, demanded a deed of trust, which was refused; and that he then brought suit against *Knab*, and obtained a decree. P. 14, f. 31. That H. L. Palmer, by order of the court, executed a deed; and that he is a *bona fide* purchaser for a valuable consideration without notice. P. 14, f. 32.

(But there is no statement as to the amount paid to Butler, the precise time when paid, or what were the incumbrances paid, or how much they were, or when paid; consistently with the answer one dollar might have been paid to Butler and the balance in incumbrances, or the reverse.)

9. Alleging the sale by Brown to Smith to be without

consideration, for the purpose of giving jurisdiction to the Federal Courts.

To this last allegation, affecting the jurisdiction of the court, exceptions were filed. Record, p. 16.

And as to that part were allowed. Record, p. 17, f. 37. So that for the purpose of the hearing below and this review, no such defence was made.

A replication was filed. P. 17.

It will be seen from this statement of the answer that the defence turns principally not upon a denial of the facts stated in the bill, but upon the following allegations:

1. Either that Davis did not hold in trust for Hubbard, or the trust was fraudulent as against creditors. It will be remarked in regard to this allegation, that it is in the alternative, not stating that there was no trust, or conceding the trust, stating that it was fraudulent; 2d. It does not give the names of any creditors or even specifically allege that there were creditors to be defrauded by the trust; it leaves no chance to meet the allegation by showing the non-existence of debts, because no particular debt is stated; and I will here add, no particular debt is proved; 3d. It does not allege that there was fraud upon any one attempted by Hubbard in the particular transaction of which complaint is made, to wit: the act of Butler, (acting as agent of Hubbard in completing the sale to Schram and securing Knab through the deed of Davis,) by which Butler, as agent, fraudulently attempted to appropriate to himself land which Davis, the grantor, intended to convey to the use of the principal. It will be seen that the rights of these parties depend upon a transaction in itself entirely honest, and not affected by the question as to whether there was, prior to the deed of Davis, any valid trust in him or not. It is conceded in the answer and proven, as well by the witnesses of the defence as of the complainant, that Davis, recognizing the right of Hubbard, conveyed, at his request and for his benefit, the land to Knab. And we insist that Butler, agent for Hubbard, in receiving that deed and securing Knab, cannot deny the right of Hubbard to force a deed from Davis, and on the ground of such denial convert to his own use property conceded by Davis to Butler's principal. It was immaterial to Butler, the agent, as against his principal, whether Davis might have successfully denied the right of the principal or not.

2. The second defence alleged is a purchase by Butler,

assignor of the defendant, from Hubbard of the land in question.

3. The third and last defence is the plea of *bona fide* purchaser of the bond. If this plea amounts to anything, it is that the title was in Knab of record, and Orton supposed the land belonged to Knab.

But he neither tells the Court when he learned that Butler purchased of Hubbard, nor does he explain why the bond, which he purchased, should show upon its face that Knab was to receive no valuable consideration for the land, nor why, as Butler never performed the condition of the bond, he considers Butler entitled to the premises.

These three defences constitute the substance of the defendant's case as stated in his answer.

The allegation upon information and belief that Knab knew the contents of his bond might, if true, affect the credibility of Knab, but could not mitigate or relieve the fraud upon Hubbard, who certainly trusted the management of the property to Butler. On the 24th day of June, A. D. 1863, or about seven years after the bill was filed, Orton proposed to amend his answer, (Record, p. 18,) which, however, the Court refused to allow. Record, p. 19.

As a matter of convenience, the parties stipulated that the testimony taken in the former case (of Smith *vs.* Orton, dismissed without prejudice,) might be used at the hearing. Record, p. 17, f. 38.

The complainant proved all the material allegations of his bill:

1. That Davis held in trust, and for the benefit of Hubbard.

Testimony of Cyrus D. Davis, Record, p. 31.
" " Knab, " p. 30.

It will be recollected that all parties concede the legal title of Davis, and claim such title through him. We shall hereafter allude to that part of the testimony for defence relating to the design to defraud creditors.

2. That Hubbard claimed to own a part of block 43, and made arrangements with Schram to sell it.

Testimony of Knab, Record, p. 29.
Answer of Orton, p. 17.

3. That Butler desired the sale and received a portion of the money appears from

Testimony of Knab above cited.

Testimony of Schram, (answer of 5th inst.,) p. 31.
Note of Butler to Hubbard, dated July 22, 1848, for $300. Record, p. 59.

It will be seen that this note is of the same date as the acknowledgment of bond to Schram, and so is identified as belonging to that transaction. Record, p. 8.

4. That Hubbard was infirm in mind by age and habitual intemperance.

Deposition of Selby. Record, p. 120.

5. That in the consummation of the arrangement between Schram, Knab, Hubbard, and Davis, Butler acted as agent of Hubbard, without the presence or interference of his principal, received the deed from Davis, caused the bond to Schram and the bond from Knab to himself to be drawn; the latter being the bond which Orton claims to have bought from Butler, and through which he seeks to defeat the rights of Hubbard.

Answer of Orton acknowledging that Butler attended to the execution of the papers. Rec., p. 13, f. 30.
Testimony of Knab. Record, p. 30.
Testimony of Ripley, (for defendant,) second cross-interrogatory. Record, p. 38, f. 71.
Answer to second cross-interrogatory. Record, p. 46, f. 81.

In this connection, we refer the Court to the bond of Knab and Butler to Schram, Record, p. 39, and the bond of Knab to Butler, under which Orton claims, Record, p. 41; also to the assignment to Orton, Record, p. 41.

It will be seen that Hubbard is ignored in each of these bonds; that by the first, Butler and Knab agreed to procure title to themselves and convey to Schram; and in the second, the consideration of the agreement of Knab for conveying the premises to Butler is recited to be, Butler perfecting title to the lots in block 43 in them, Butler and Knab, as per their bond to Schram.

And Ripley testifies that when he drew the papers no interest of Hubbard in the transaction was disclosed to him. That Hubbard did not understand that title to the lots were to pass to Schram through Butler and Knab is shown, first, by the testimony of Knab and others above referred to, and, second, by the fact that he did afterwards perfect title in himself, and convey in his own name to Schram, as will hereafter be shown by references to testimony.

That Butler had cause to conceal his bond is shown by the fact that he never recorded it, and it was first recorded in March, 1851, nearly three years after it was given, and upon the sale to John J. Orton.

Certificate of Register, Record, p. 42.
Answer of Orton, Record, p. 14, f. 31.

6. That Knab signed the instrument to Butler without knowing its contents, but relied upon Butler's being agent for Hubbard for the correctness of papers drawn.

Testimony of Knab, answer to seventh interrogatory, Record, p. 30, f. 60.

This, however, seems not very material, as Butler and Knab together had no right to dispose of Hubbard's property.

7. It will be remembered that Hubbard trusted Davis without any writing to bind him, and directed by the way of security to Knab a quit-claim deed to Knab; that as appears by the testimony of Knab and all the facts, he never required a writing from Knab to show his interest; it is alleged in the bill that Knab was known to him as a man of integrity on whose word reliance could be placed, &c.

This is shown, first, by the willingness of Schram to accept Knab as security; second, by all the negotiations between Butler, Hubbard, and himself, about becoming security; and third, by the fact that having the title of the property *apparently* in his own hands, with his bond to Butler forfeited through non-performance, on the part of Butler, of the condition, he never sought to claim any interest in the premises or receive any advantage out of existing litigation.

8. To prove the allegation of bill, (p. 3, f. 10,) that Butler never fulfilled the condition of the bond of Knab to himself, or procured any title to himself or Knab in the lots in block 43, and that the bond of Butler and Knab to Schram remained with its conditions unperformed for more than a year, and that Schram finally obtained title from Hubbard and not from either Butler or Knab, is shown by

Testimony of Schram. Record, p. 31, f. 61.
Power of attorney from Lewis F. Hubbard and Emily Bates to Otis Hubbard. Record, p. 48.
Deed from Emily Hubbard to Otis Hubbard. Record, p. 49.
Deed of Charles F. and Julia Bates to Otis Hubbard. Record, p. 50.

Deed of William and Emily Jewell to Otis Hubbard. Record, p. 51.
Deed from Otis Hubbard to Schram. Record, p. 52.

And to show the negative, to wit, that Butler never had any interest nor conveyed any to Schram, we had the certificate of the register. Record, p. 57, f. 96.

9. That the plaintiff acquired Hubbard's title.

The rights of Hubbard have been duly vested in the complainant by a series of conveyances—first, Hubbard to Gruenhagen, deed dated June 7, 1851, for the nominal consideration of one dollar. Record, p. 53. But at least a part of the real consideration appears, by the mortgage of Gruenhagen to Hubbard, for purchase money for twelve hundred dollars. Record, p. 22, f. 48. By the bond to be found on the same page, it appears that the same was to be paid upon Hubbard's clearing the title; what sum was paid in money does not appear.

Gruenhagen conveyed to Brown by deed dated December 7, 1852.

This was a warranty deed in consideration of fourteen thousand dollars, by which several tracts of land specifically described were conveyed; and this particular tract was carried by the latter clause of the deed describing all the right, title, and interest of the grantor in law and equity to lands in Milwaukee county. Record, p. 20.

Afterwards, as a matter of convenience, a new quit-claim deed was made out, describing this particular tract, with a consideration mentioned of one thousand dollars; this deed from Gruenhagen to Brown was dated December 31, 1852. Record, p. 54.

The next deed is Brown to George Smith, dated January 1, 1853. Record, p. 55.

This deed conveyed the right of the grantor to George Smith; or in other words, conveyed the property subject to the mortgage to Hubbard. The consideration of the deed, therefore, so far as the record discloses it, was the payment of the mortgage (given by Gruenhagen to Hubbard) to Laphom, administrator, for the benefit of creditors and heirs of the estate.

This mortgage was subsequently satisfied. Record, p. 23, f. 50.

It will be seen, therefore, that after this conveyance, the contest, at least as to such part of the value of the land as was covered by the mortgage, was between the creditors of Hubbard and the defendant Orton.

The apparent legal title being then in Knab, for the benefit of Hubbard, but counsel supposing that the deed of Davis to Knab was, under the circumstances, merely a mortgage, it was agreed for a certain consideration, between Smith, (through his attorney,) and Laphom, as administrator, that the latter should consent to a conveyance by Knab and Davis to Smith.

Testimony of Brown, (witness for defendant.) Record, p. 123, f. 221.

We hope the Court will pardon us for here calling their attention to the fact that Mr. Brown was called as a witness by the opposite party; that it was at the hearing, and against his own objections appearing on the record, that his testimony was strictly limited to explanations of matters inquired of by the other party, and that he did not yield to that most pernicious and disgraceful practice of attorneys voluntarily becoming witnesses in behalf of their clients.

Knab and Davis did in fact subsequently convey to Smith.

Deed of Knab to Smith, dated January 29, 1853. Record, p 56.

Deed of Davis to Smith, dated January 12, 1853. Record p. 56.

10. We have already pointed out to the court the proof that Hubbard, while the bond of Knab was concealed by Butler and before it was put upon record, himself obtained title and conveyed to Schram, which he would hardly have done had he known about the bond. He could, by keeping the title to the Schram lots in his own name, have forced a conveyance to himself of the premises in question. As to the incumbrances spoken of, the only one which has been mentioned by name either by Orton or Butler is that of McDougal *vs.* Hubbard. This is mentioned by Butler in his testimony (taken in the case of Orton *vs.* Knab, and introduced here to show that he makes conflicting statements) as one that Orton paid. Record, p. 83.

But we show by the certificate of the Clerk that this judgment was still a lien at the death of Hubbard, (Record, p. 57, f. 96;) that it was assigned to Selby, (Record, p. 58;) and, by the receipt of Selby, that it was paid by Laphorn, administrator of the Hubbard's estate. Record, p. 58.

11. The bill referred to, of Hubbard and Orton, Knab and Butler, the writ of injunction against a disposal of the prop-

erty by Knab to Orton, and the record of the other facts connected therewith, are produced.

Bill of Hubbard. Record, p. 93.
Injunction. Record, pp. 97, 98.
Answer of Knab. Record, p. 99.
Answer of Orton. Record, p. 106, *et seq.*
Answer of Butler. Record, p. 110.

Increase A. Lapham appeared as administrator and filed replications, &c.

The subsequent proceedings in this case are on Record, pp. 112 to 115.

This was a bill of Hubbard, setting forth the facts (and swearing to their truth) substantially as they are here set forth, and seeking to set aside the bond.

It seems to have been filed in pursuance of the arrangement between Hubbard and Gruenhagen to clear up the title. But Hubbard must have failed to disclose that transfer to his counsel, (Mr. Brown,) or he would have advised a suit in the name of Gruenhagen.

After the death of Hubbard and the appearance of Lapham as administrator in the suit, the fact of the sale to Gruenhagen became known to counsel through his purchase of Gruenhagen's interest in lands in Milwaukee county, and it was then apparent that the suit could not be sustained, nor by bill of revivor and supplement could the assignor take advantage of the proceedings, as Gruenhagen was a prior and not a subsequent assignee.

No proof was taken in the case, and it was subsequently discontinued as to Orton and Butler, and a decree asked against Knab only, who assented, which the court refused on the ground of want of parties. The case was dismissed without prejudice.

12. Orton, after the bill above referred to was filed, and consequently while he had full knowledge of the rights of Hubbard, filed his bill for specific performance against Knab alone, treating Knab as the owner of the property, alleging a sale to Butler, and that *Butler* had fulfilled the condition of the bond. Record, p. 69.

To this bill Knab filed an answer, conceding among other things that the condition of the bond was substantially complied with and satisfied, and that he had no further interest; he sets up the fact that he held merely for security; that he had supposed the property belonged to Hubbard, and when

signing the bond he had supposed it to be one to re-convey to Hubbard. Record, p. 74.

On December 22, 1853, this bill was dismissed for want of parties. Record, p. 91.

This left the complainant (Smith) with a perfect legal and equitable title in the premises by virtue of the deeds from Hubbard, Davis, and Knab, referred to, and without any pending litigation or suit as to his right.

As a subsequent special term, on June 19, 1854, Orton commenced proceedings in the Supreme Court of the State of Wisconsin by way of appeal. Record, p. 91.

A decree was entered *in* the SUPREME COURT at the December term, A. D. 1854. Record, p. 115.

This decree recites that it appeared by PLEADINGS and proofs that the condition of the bond to Butler had been satisfied by *him* (Butler) and his ASSIGNEE, and that the bond was conditioned upon such performance, to convey, &c.

Henry L. Palmer, as commissioner, executed a deed to Orton. Record, p. 117.

This was the end of litigation in the State Courts.

We have, by the preceding references, shown the proof sustaining the allegations of the bill, and will now refer the court to the defence.

1. The first defence is in the alternative: either that there was no trust in Davis or it was fraudulent as against creditors.

We have referred the court to the proof of a trust in Davis for Hubbard, and there is no proof to negative it.

To sustain the charge of fraud against creditors, there is no proof of the name or debt of a single creditor at the time of the conveyance to Davis. The only debts shown in the whole testimony are the few and small amounts of about $1,800 altogether, which we proved were paid by the estate. These, from their nature and amount, could hardly have existed at the date of the conveyance to Davis. But there is proof, if it is to be believed, that at a time long prior to the conveyance to Davis, Hubbard stated that he had debts East, and was covering up property.

Sylvester Pettibone, in 1854, testifies that he had a conversation in 1836, (18 years before,) in which Hubbard stated that owing to pecuniary embarrassments East he could not do business in his own name, but had property in the name of others. Record, p. 45.

His memory and the value of his testimony are tested by

the fact that being asked whether he had testified before as to the same facts between the parties, he testifies positively that he had *not* been so examined; he then comes back and adds, by way of note to his testimony, that he had been examined.

Being asked as to his business relations with Orton, he answers he has sold him a house and borrowed fifty dollars; he returns and signs a separate note, saying that he procured Orton to buy a house and lot sold on a foreclosure. Record, p. 46.

John A. Messenger testifies to the same class of statements, giving no date, or place, or language used; he THINKS he held lands himself.

On cross-examination he states that he conveyed to Davis the premises in question, and notes given by him to Hubbard were surrendered as a consideration. We will call attention to the proof already referred to, that Messenger was sued upon the notes and conveyed the lots in satisfaction. Record, p. 44.

Butler (the obligee in the bond) testifies to his understanding, that his (Hubbard's) embarrassments East were the cause of his having property in the names of other persons. Record, p. 42.

We shall show the worthlessness of his testimony hereafter.

This is the substance of the testimony of the defendant to sustain his charge of a fraudulent trust in Davis.

It will be seen that the proof of statements as to debts East apply to his original transactions, and go as far back as 1836; that none applies to the time when Davis received the deed.

That there was no such understanding between Davis and Hubbard is proven by the express statement of Davis, (called out by the defendant,) to the effect, that, although he had supposed it to be the object of Hubbard to screen his property, no such intention was expressed to him.

Record, p. 32, answer to second cross-int.

This is the only testimony as to the transaction between Davis and Hubbard, and it is as follows: Hubbard gave to Davis notes signed by Messenger to collect or secure; and Messenger, in consideration of these notes, conveyed the property to Davis; and there was no agreement, or understanding, or word between them about screening it from creditors.

The mere suspicion of Davis that such was the case, not communicated to Hubbard, could not affect the trust in favor of Hubbard, especially in the absence of proof of the existence of a single creditor. And had there been such creditor or a judgment lien at that time, the defendant would certainly have shown it to this Court.

We have also referred the Court to the proof that Hubbard afterwards took the title of the Schram lots (which he was to convey free from incumbrance) in his own name, thereby showing that he was conscious of no obstacles to his holding property at that time.

Messenger in his testimony intimates that he held this and other property for Hubbard as a cover; if such were the case, then there was no motive for placing it in the hands of Davis, especially as Hubbard held against Messenger the notes as security, and had nothing but the honor of Davis.

A part of the record from the probate office has also been introduced, showing the debts proven; and their amount and character show that they could hardly have existed at the date of the transaction with Davis; and only one was a judgment, (in favor of McDougal for $168,) which was dated in February, A. D. 1851, years after this transaction.

Record, p. 56.

And these were paid by the administrator.

But Davis deeded for the benefit of Hubbard, and at his request, and Butler, acting as agent, deprived his principal of the benefit of that deed; there is no pretence or allegation that in this transaction the deed was fraudulently given, and therefore the validity or invalidity of the trust in Davis cannot affect the transaction; it is enough that he conceded it; all parties, Orton as well as the complainant, claim through this transaction.

2. The second defence set up, to wit, a purchase by Butler from Hubbard, rests on the part of the defendant upon the testimony of Hubbard alone.

There is no pretence that it was ever evidenced by any writing, or that there were other witnesses to it, or that any money, note, or receipt was given in consequence.

Cross-examination of Butler, p. 42.

In answer to the sixth cross-interrogatory, he says that for two years previously Hubbard had expressed an intention to convey some piece, and this bond was made by his direction to carry out the agreement.

The Court will recollect that all the witnesses concur in the fact that Hubbard gave no direction about the papers, was not present when they were executed, and Ripley, who drew the papers, testifies that it was not disclosed to him that Hubbard was interested in any part of the transaction—Butler acted for Hubbard.

Butler further states that the consideration was an indebtedness of Hubbard to Butler for board and groceries.

Eighth cross-int., p. 34, and answer to same, p. 43.

He declines giving the items of indebtedness or how they accrued, alleging that his books were stolen.

We have introduced, to contradict here, his oral examination in the case of Orton *vs.* Knab, in which he charges his wife's children with having taken them—he does not assign a motive, nor can we imagine one.

He further states the indebtedness at $800. He further states that he acted by Hubbard's directions in causing the bond to be drawn, but had no recollection of disclosing to the person drawing the paper the interest of Hubbard.

So that the Court is asked to believe that a verbal sale was made in satisfaction of a part indebtedness, amounting to about $800, of which he cannot give the items.

We ask a perusal by the Court of the cross-questions and answers together, as nothing but reading them both can give a fair idea of his dishonesty.

Cross-question, Record, p. 34.
Answer to cross-questions, Record, p. 42.

To show the different statements of Butler as to the transaction, we call the attention of the Court to the statement of Butler in reply to interrogatories 5 and 6 (Record, p. 95) of Hubbard's bill. Record, p. 110.

It is there stated to be in consideration of divers goods, wares, and merchandise, work and labor, care and diligence, and in consideration of the support and maintenance of Hubbard, and of NATURAL LOVE AND AFFECTION; money paid, work done and performed, &c. It further states as a consideration, money paid in going East *after* the date of the bond, which he prudently gives up in his testimony, as such expense could hardly have been anticipated at the date of the alleged purchase. It will be perceived that *board* is not mentioned.

But the most complete account of the transaction is given

in his oral examination in the case of Orton *vs.* Knab, which we introduce to contradict his statements here.

Record, p. 61.

He there says that he boarded Hubbard, let him have some groceries and some *money*; that Hubbard owed him under ordinary circumstances $1,000, but under the extraordinary $2,000; that his account had been running 3 or 4 years, and he thinks he let Hubbard have $500 or $600 in cash.

(It will be recollected that in his testimony here no allusion is made to cash.) That he had paid $80 in cash a week before the date of the bond, and *no* part of the consideration afterwards, (see his answer in Chancery above referred to;) that Hubbard *and Knab* talked it over, so that KNAB fully understood that the bond was to run to Butler; that the merchandise sold was tobacco, cigars, groceries, tea, sugar, and coffee. (It will be recollected that Hubbard was unmarried, boarding, as Butler says, with him.)

We ask the Court to read this entire testimony of Butler, commencing on Record, p. 60, as an attempt to extract from it here must do injustice to its evident untruthfulness. We shall have occasion further to refer to it in connection with the alleged payment by Orton to him.

To show that Hubbard was not owing him at all, and therefore that he did *not* purchase in consideration of an indebtedness to him, we have introduced his eight promissory notes, the first dated August 11th, 1845, and the last May 11th, 1850, for various services, thus showing that Butler owed Hubbard, and was from time to time borrowing from him.

Record, p. 59.

These notes came from the possession of Lapham, administrator of Hubbard.

Record, p. 90, f. 154.

And Knab testifies that there was no previous understanding between him and Butler or Hubbard that the land should go to Butler.

Record, pp. 29 and 30.

3. The next defence is, of having paid for the bond $2,200, in ignorance of the rights of Hubbard, and supposing Knab's title to be perfect, and the bond good. He says he paid a part in money to Butler AT THE TIME of purchase,

and the rest in paying off incumbrances on the Schram lots. To show that payment rests upon him. He has furnished no proof either that these incumbrances existed, or that he paid any. Had there been such, he both could and would have shown them.

In the oral testimony of Butler, introduced to disprove his present testimony, being hard pressed, he mentions the McDougal judgment, ($168,) which we have shown was dated in 1851, three years after the Schram bond, and was paid by Hubbard's estate. That part is therefore entirely unproved. To prove any payment he rests upon the faithful Butler. This was transacted between them without other witnesses, and without writing, aside from the assignment.

Butler states on his direct examination that the consideration was $2,100 or $2,200, and was paid to *him*.

Record, p. 42.

In his cross-examination he says it was paid *mostly* in money, and some in paying incumbrances and other claims; that Orton paid at *different* times $1,200, and the balance in incumbrances.

Record, p. 43, f. 78.

And in connection the question, p. 35.

But Orton, in his answer, under oath, to the bill of Hubbard, says that the consideration was made up of money *obligations* of him, (the said Orton,) *claims* and *accounts* against Butler, payments and SERVICES in fulfilling the condition precedent on the Schram bond, and of taxes and assessments on the lands in dispute. Record, p. 107.

He makes no mention of having paid *money* to Butler, nor does he tell us how large his claims were against him, or what he charged for *services*, nor how much were in taxes, &c., on the lands.

Butler, in oral testimony, says he received at one time $800, at another $300, and at another $200, and the balance was in relieving him from certain liabilities; what they were he could not state. Record, p. 83.

We ask the court to read the whole of the cross-examination as to that.

He afterwards states that $800 was paid down, $300 in about three months, $200 three months later, and $50 in a year afterwards. P. 84.

Thus we have Orton contradicting Orton, Butler, Butler, and each contradicting the other.

2. Orton, in his plea, (if he means anything,) says that he bought, supposing the title was, as appeared by Record, perfect in Knab, and that he knew and inquired about no facts outside, supposing Butler's title to be purely through the bond.

In his bill against Knab, through which he received the deed from Palmer, he claims that Knab was owner in fee simple and Butler was a purchaser from him, and that the consideration was as mentioned in the bond; he alleges Butler, Knab, and himself performed the condition of the bond to Schram; he sets up no other equity or rights in Butler. Record, p. 60.

And this is sworn to by Orton. But by reference to the bond to Butler, it will be seen that it recites as the sole consideration, that Knab was surety for Butler on the bond to Schram, and if Butler would save his surety harmless in certain respects, then he (Knab) would convey. Record, p. 40.

Inasmuch as a principal is bound in every event to save his surety harmless, the bond discloses the absence of a legal consideration, which might induce a court of equity to enforce it. Orton, therefore, had notice that this Butler, considered as a purchaser from Knab and not supporting his claim by a purchase elsewhere, had no rights. Again, Orton relies upon the record; the consideration for the bond was Butler's procuring certain conveyances to himself and Knab in pursuance of their bond to Schram; the record showed that this was never done, but Schram procured his title through another source, to wit: Hubbard.

In the court below the defendant called upon Brown, attorney for the complainant, to show that in acting in the case of Orton *vs.* Knab, altogether nominally acting for Knab, he really acted in the interest and under the retainer of George Smith; and we are told that defendant contended at the hearing that Smith became thereby bound by the record in that case. As the same thing may be insisted upon here, (although no pleading sets up any such fact,) we would call the attention of the court to the cross-examination, showing the reasons for such interference in the case of Orton *vs.* Knab to be the same stated in the bill, to wit: because, in our opinion, Knab had not raised an issue under which the merits could be tried, and we wished to force Orton to make George Smith a party to that suit, so as to set up his defence and have his rights litigated. Record, p. 123.

But we did not succeed.

Further, the record of Orton *vs.* Knab shows that George Smith never appeared there, and that Mr. Graham, and not Brown, was attorney for Knab, although Mr. Brown took some testimony in behalf of the defence in the name of Knab.

This was done with the consent of Knab, and we cannot see that it affects the force of the record.

To avoid confusion from testimony in the various cases, we would remind the court that only the testimony in the case of Smith *vs.* Orton is made testimony in this case under our stipulation, that the defendant filed the record in Orton *vs.* Knab for the purpose of showing his title, and the testimony in that case came in as part of the record, and is not, as such, testimony for the defendant.

That the testimony of Butler, taken in that case, was used by the complainant (after due foundation laid) to impeach him, and to show that he had before testified differently. The record of Hubbard *vs.* Orton, Knab, and Butler was admissible to prove that the allegations of the bill in relation thereto in this case were correct; and the answering of Butler and Orton are used to contradict and impeach their present statements.

POINTS.

I. The principles of law applicable to this case have all been determined by this Court, and as it is now presented; it is chiefly a question of the POWER of the Court to enforce its own decisions, and of the right of the Judge of the Circuit Court to set such decisions aside. The defendant demurred to the bill of complaint; that demurrer was sustained by the District Court, but upon appeal was reversed here.

Smith *vs.* Orton, 21 Howard, 241.

The Court then reviewed the principal facts, and held that, sustained by proof, they made a good case; they reserve, however, for future consideration the effect of a plea of *bona fide* purchase, &c.

We insist that the decision and opinion referred to became the *law* of the case, and, right or wrong, cannot be reviewed.

This is a simple proposition, requiring no authority to support it; but we will cite a case from Wisconsin, in which the learned Judge cites a very large number of authorities.

Pierce *vs.* Kneeland, 9 Wis. Rep., 23.

We know the other side contend that the decision of this Court in Smith *vs.* Orton, 18 Howard, p. , is in direct conflict with the one referred to in this case. But in that case the order of dismissal was expressly without prejudice, and it turns upon the supposed pendency in the State Courts of suits involving the same questions. Although we think that objection entirely obviated, we will not here discuss it. That opinion was before the Court when in 21 Howard they laid down the law to guide the Court below in adjudicating between these parties.

II. Taking it, then, for granted that the adjudication of the law of the case as given in 21 Howard is not now the subject of review, we insist that the decree of dismissal was wrong, because not only is every material fact alleged by the bill proven, but the greater part of the facts are either admitted or not directly denied by the answer.

1st. We have shown that the consideration paid by Davis for the land was notes belonging to Hubbard; and that he held the land as the property of Hubbard, and finally, in execution of a trust acknowledged by him, conveyed to Knab.

2d. The testimony of Butler, Knab, and Ripley, and even the defendant's answer, show that in consummating the arrangement between Hubbard, Schram, and Knab, and in procuring the papers to be drawn, Butler acted as agent of Hubbard.

3d. It is proven that Butler employed a lawyer to draw the papers, and did not disclose to him the interest of Hubbard in any part of the transaction, but caused the papers to be drawn with the view of securing to himself Hubbard's interest in the land, and depriving his principal of such interest; that Hubbard was not present and gave no directions.

4th. It is shown by Knab (although contradicted by Butler) that he supposed the bond ran to Hubbard and not to Butler, when he signed it, and that he received no consideration for it whatever. And they all agree that Knab received title only by the way of security.

5th. It is shown that Butler concealed his bond until Hubbard, in fulfilment of his own verbal agreement, had conveyed to Schram. On the 22d day of July, 1848, the papers relating to the sale to Schram were drawn. The consideration by which Butler was to obtain these lands was his acquiring title to himself and Knab in the Schram lots, and protecting Knab against his liability to Schram. The title to these lots was perfected in Hubbard, and on July 8, 1850, about two years after the date of these papers, he conveyed

to Schram. On the 13th day of March, A. D. 1851, about eight months after Hubbard had conveyed, Butler assigned to Orton, and the bond made its appearance on the record.

That Hubbard did not know that the title was to pass through Butler and Knab is proven by the fact, that on the the 21st day of August, 1848, a little more than a month after the transaction, he received the power of attorney from Jewell to convey, and on the 15th day of December, A. D. 1848, in a little more than five months after the transaction, he took in his own name a deed from Emily Hubbard of her interest in the premises, which title remained in him until his conveyance to Schram, a little less than two years.

These facts show not only the ignorance of Hubbard that he was to have nothing to do with his own sale to Schram, but also that he was not conscious of any reason (at that time at least) why he should not hold title in his own name.

The reason why Butler should conceal the fraud is apparent. The bond to him was conditioned upon his procuring title to himself and Knab, and protecting the latter on the Schram bond.

Hubbard alone could procure and convey title. The bond was worthless without the co-operation of Hubbard. It was only after the mortgage to Knab was satisfied that the equity of redemption could be made valuable.

If it be asked why he waited the eight months before using the bond, the answer is:-1st. That it was difficult to find a person who would take the assignment and still know nothing about its object or the right of the assignor to the property; 2d. There was still some difficulty about the property, which, from the testimony, you must suppose to be the want of a certificate required by the statute of Wisconsin as to the official character of the officer out of the State taking the acknowledgment of the power of attorney from Lewis Hubbard, and the same deficiency in the deed of Emily Hubbard, defects which the statutes of Wisconsin have since cured. There is no witness who pretends that after the execution of the bond, it was shown to Hubbard, or that his attention was ever called to it.

On the contrary, Hubbard must have supposed the anxiety of Butler to complete the transaction to have been for the purpose of borrowing three hundred dollars of the money paid by Schram, for which Butler gave a note, which is still unpaid.

6th. The complainant is the owner of the interest of Hubbard.

1. Hubbard conveyed to Gruenhagen. The deed recites a consideration of only one dollar, but although there was probably a further moneyed consideration, the mortgage of $1,200 for purchase money was a valuable consideration.

2. Brown purchased all the property of Gruenhagen in Milwaukee county; the deed describes a large amount of lands specifically, and then has the sweeping clause conveying all grantor's land in the county. The consideration was $14,000 for all the tracts; and as it was an entire consideration, it need not be apportioned, but supports the whole grant. (See Record, p. 30.)

Afterwards another deed was given describing this piece alone, but as it was granted by the first deed, this one seems to have been a mere matter of convenience between the parties, and the additional consideration of one thousand dollars recited may have been mentioned as what the parties considered the fair proportion of the consideration to be apportioned to this piece, or, what is more probable, the interest due on the incumbrances on the property conveyed in the first deed may have exceeded by a thousand dollars the estimate, and so this deed only expressed the increased consideration.

3. Smith derived title through deeds from Brown, Davis, and Knab. This title was subject to the mortgage to Hubbard of $1,200. Hubbard was then deceased and Lapham represented creditors. So that the question between Orton and Smith was, to the extent of the mortgage, a question between Orton and the creditors whom his pretended purchase would defraud. The condition of this mortgage, however, was that Hubbard should clear the title. We do not know, so far as the evidence discloses, anything beyond this as to the transaction between them. Hubbard is dead, and as nothing is stated as to the whereabouts of Gruenhagen, we may well suppose either that he is dead or has gone to some place where he cannot be discovered. Yet all the testimony justifies the belief that Hubbard, being in great need, sold the premises for a small sum in cash and the mortgage. If, then, Smith or Lapham, administrators of Hubbard, should fail, as against Orton, the mortgage had no force.

The settlement of the mortgage and the deeds from Knab and Davis were parts of one and the same transaction.

In considering this arrangement with Lapham, it will be recollected that the burden of perfecting title was on the estate; that a suit had been commenced by Hubbard, which must fail on account of his secret sale to Gruenhagen; that

Orton and Butler had directly, in their answer to the bill of Hubbard, contradicted his statement; that although their statements were absurd, the direct contradiction which we have here produced was not then known; that large costs had become due both in court and for counsel; and that future litigation from the manifest intention of Orton and Butler to leave nothing undone to secure their plunder, would be both expensive and tedious. Under these circumstances, the administrator wisely concluded to accept a small sum ($150) in cash, be relieved from liability for costs and counsel fees growing out of prior litigation, and from all liability for future litigation.

Smith, through his attorney, assumed all these, and also undertook to indemnify Knab for costs and liability in the suit of Orton, and by direction of Lapham as administrator, received deeds from Davis and Knab. This constituted not only a valuable, but, in view of the protracted litigation since, a large consideration.

There is no proof as to what was paid Brown, nor was that necessary; his deed was subject to the mortgage, which always remained a consideration.

But while the value at that time is not directly shown, it is proven that the sum which Orton pretended to pay for the land was $2,100.

If, as we shall endeavor to show, that transaction was all a sham, entered into with the double view of enabling Butler to be a witness and Orton to claim to be a *bona fide* purchaser, so as to cut off Hubbard's rights, then we may suppose they fixed a nominal price about equal to the value of the land. The Court, by recollecting the history of the Western country from that date until the filing of the bill, at which time the land was worth $10,000, the rapid increase in population, and consequent increase in value of real estate, will readily perceive that from $2,100 to $2,500 must then have been the value. The excess of value of a title free from litigation over the mortgage was about $1,000.

The costs in the two suits alluded to, including counsel fees, would naturally eat up a good portion of that excess, and the prospective litigation would certainly be somewhat expensive.

That the grantee of Gruenhagen did not consider the title of great consequence, is evident from the fact that in the original deed, when various prices were specifically described, this was not deemed of sufficient consequence to have a description by itself, but was trusted to the general clause

carrying all lands in Milwaukee county. By looking at the date of the subsequent specific deed to Brown, it will be seen that it was probably part of the transaction by which Smith bargained with Lapham and obtained title to himself. Independently of the arrangement with Lapham, the parties most interested in the suit, as against Orton, were Lapham, administrator, and the creditors whom he represented.

7th. The suit by Hubbard against Orton, Butler, and Knab, the injunction against a conveyance by Knab, the subsequent fraudulent suit by Orton and Knab alone, the dismissal of both suits by the Court, (thereby rendering the title perfect in Smith,) and the subsequent commencement by Orton of proceedings by way of appeal against Knab alone, after all title had passed from him, and also the decree in the Supreme Court, are all showed as stated in the bill.

The case stated in the bill is, therefore, made good by proof, and we are, therefore, under the decision in 21 Howard, entitled to a decree, unless one of the defences set up in the answer is made good.

III. In equity as well as at law the rule that the allegations of pleading and the proofs (*allegata et probata*) must correspond prevails. This hardly requires authority, but as this case originated in Wisconsin, we will cite an authority from that State, which we shall chiefly use for another purpose.

Brayton *vs.* Jones, 5th Wisconsin, 117.

James vs. McKeown 6th Johnson's Rep 543

We therefore insist that after the allegation that the object of the conveyance to Smith was for the purpose of ousting jurisdiction was expunged by order of the court, it would have been irregular to introduce any proof to controvert that allegation, and it cannot here be reviewed.

But as a matter of precaution, we would here remark that it is nowhere pretended that the entire title of all the parties claiming in opposition to Orton did not pass to Smith. It is certain that he holds it both at law and in equity as against Brown, Davis, Knab, and Hubbard. Neither of them has any interest which at law or in equity could be enforced against Smith. And if Orton wrongfully withholds the land, it is immaterial to him what might have been the consideration for the transfer as between those parties, so long as their rights are so vested in Smith that neither of them could question an adjudication for or against him. Smith being in possession of those rights, as against

Orton, and being a citizen of another State, could enforce them in the U. S. Court.

And whether you consider this a bill to compel a mortgagee (whose mortgage has been satisfied) to surrender the legal estate, or a bill to set aside a fraudulent bond and other proceedings as a cloud upon title, or one by a *cestui que trust*, to enforce the trust against his fraudulent trustee, the only question which can arise at the instance of Orton is whether as a *fact* the rights of Hubbard *et al.* have passed to the complainant.

There is no such thing as a fraud in preferring to seek a redress in the U. S. courts rather than the State courts. It is to be presumed that both will do justice, and if Orton has no rights, and is withholding property unjustly, it is immaterial to him whether the decree to restore comes from a State or United States court.

This court has held that when a person, as a *fact permanently*, removes from one State to another, although his motive was to give jurisdiction to the United States court, he is entitled to maintain a suit. It is a right annexed to the *fact* of being a citizen of another State. His motives for becoming so cannot be inquired into. Of course, if his removal is only temporary, he gains no citizenship, and questions of that kind are always questions of intention.

But here the allegation in the pleadings is expunged, and there is not a particle of proof to impeach the title of Smith.

V. We will now call the attention of the court to the defences set up in the answer.

The first is that either Davis did not hold in trust for Hubbard, *or* that it was fraudulent as against creditors.

1st. We insist that these allegations are so indefinite as not to amount to a defence. It is in the alternative, and one part is utterly inconsistent with another. The general allegation that it was a trust in fraud of creditors is not sufficient, because the existence of creditors is necessary to the fraud. It should have alleged creditors and given their names, so that the complainant could have met the allegation by proof. But it is impossible to prove the negative: that a man owes nothing. If he proves he does not owe A, he will be met by the assertion that he owes B, &c. We suppose we need not cite authorities to show that equity pleadings require certainty of allegation, and even greater minuteness in the statement of facts than pleadings at law.

2d. Fraud is never presumed but should be proven. Not

one single debt due at *that time* from Hubbard is shown, not the name of a single creditor, (except of some long subsequent, whose small claims were paid out of the estate.) The whole proof depends upon two supposed confessions testified to by different witnesses. These were to the effect that he owed debts East, and could not hold property in his own name.

These are stated by Pettibone and Messenger; one speaks of a conversation in 1836, about seventeen years before he testified, and the other of a conversation before he conveyed to Davis.

Messenger intimates that he held lands, and this piece in particular, for the purpose of defrauding Hubbard's creditors. Neither of these should be believed. Although Pettibone testified as to a conversation seventeen years prior, he denied that he had before testified as to the same matters, and afterwards come back and said he had testified; he denied having had other business with Orton than the *sale* of a house to him; he came back and testified that he had procured Orton to purchase a house at a foreclosure sale. If his memory as to immediate transactions was so bad, it was worth nothing as to a conversation seventeen years before. It was evident that through the purchase by Orton of the house, he was in some way, which he did not care to disclose, in the *power* of Orton.

And it is extremely improbable that Hubbard, wishing to conceal property, would be proclaiming to strangers his policy. As to Messenger, it appears that Hubbard never trusted him, but sold property and took notes for it; and finally enforced the notes by suit, and compromised for the property.

Hubbard dealt with him at arm's length, and it is improbable that so distrusting him he gave information which might have been a defence to the notes.

When Davis took the property, holding it really in trust, Hubbard asked neither notes nor writing; this, we suppose, was partly because he had ceased to be a business man and partly because he justly had full confidence in Davis. As against this vague testimony, we have, first, the testimony of Davis, who states positively that Hubbard communicated to him no such intention.

This is positive proof, and as the question is as to this particular title, it can not be defeated by other transactions. It is true that Davis adds, he had an idea that Hubbard wished to protect it from creditors, but that suspicion

never was communicated to Hubbard; therefore it could not defeat Hubbard's equity.

Again, if there had been debts, the defendant was bound to prove them, and would prove them, yet he has failed to do that.

We have produced the only negative proof possible, shown the debts paid by the estate, and further prove that Hubbard was conscious of no reason why he should not hold property in his own name, because within a few months after the sale to Schram he took deeds of that property to himself, and the title to Schram came through him. Besides, in his transactions with Schram and Knab, he had no concealment, but openly proclaimed both pieces to be his own.

Again, it will be recollected that Hubbard alone could explain these things; that neither in his bill against Knab nor his answer to the bill of Hubbard did Orton set up this defence. Nor did Butler in his answer to the bill referred to. This defence was first discovered after the death of Hubbard.

If it is right to theorize upon the testimony, it is evident that if Hubbard ever owed debts, he had, at a period before his dealings with Davis, settled them; that then he called upon Messenger either to pay the notes or return the property, perhaps with a view of using them in such settlement; that Davis refused to do either, threatening to set up as a defence, that the notes were given with a fraudulent intent; that to avoid such defence, they were placed in the hands of Davis. It is enough for our purpose that at the date of this transaction, there were no creditors, and therefore there could have been no intent to defraud them.

VI. It makes no difference whether Davis, as a fact, held in trust or not; he acknowledged a trust and intended that Hubbard should have the benefit of certain property; at the request of Hubbard and for his benefit, he executed a deed to Knab, which, by previous agreement between Hubbard and Knab, was to be held by the way of mortgage. Butler was the agent of Hubbard in having the papers drawn; he fraudulently had them so drawn as to deprive Hubbard, his principal, of all benefit of the property, and secure it to himself.

This is a fraud upon Hubbard, and Butler has no right to say that Hubbard could not have forced Davis to convey. If A give to B, a clerk of C, a sum of money as belonging to his employer, and B embezzle it, it is no defence that A really intended it as a gift to B.

VII. If Hubbard had no title, then it was in Davis. It is conceded on all sides that Davis *intended* the property to be applied to Hubbard's benefit; thus Knab had title only by the way of mortgage; then if the appropriation by Butler of the balance of the title was not a fraud upon Hubbard, it certainly was upon Davis, who had intended it for Hubbard.

Smith claims, as assignee of Davis as well as of Hubbard, and has the rights of both. If the whole title be considered as vested in Knab, then Knab swears that he intended t hold it for Hubbard, thought the bond signed by him ran to Hubbard, and signed it in that belief; and that it was so understood between him, Butler, and Hubbard. In the latter point of view, the conduct of Butler was a fraud upon Knab, and the complainant is also assignee of Knab. We can hardly see how the fraud of Butler can in any way, as against the complainant, be helped out by any supposed indebtedness of Hubbard.

VIII. Orton claims title through the pretended purchase by Butler, under Hubbard, and is, therefore, estopped from denying his right.

IX. The question in the first instance, and independently of the arrangement between Lapham and Smith, was principally between Lapham, as administrator, representing creditors, and Orton. The mortgage of twelve hundred dollars was then over half of the value of the property; and it would seem most ungracious to allow Orton, in the name of creditors, to cheat those same creditors out of all interests in the property. The policy of the statutes of Wisconsin is to enable an administrator to enforce a trust against one holding property in fraud of creditors of the assignor.

Rev. stat., p. 368, sec. 16.

The interest of the estate was in this instance by the way of mortgage, and was, by the arrangement between Smith and Lapham, vested in the former.

X. By the statutes of Wisconsin, trusts, &c., were only void as against creditors existing at that time. None such have been shown here.

XI. The right of free disposal of property, as against creditors, is limited only by express statute or the adoption

of the English statutes, recognizing them as mere declarations of the common law. Grants and assignments by the debtor to defraud creditors are void as against creditors defrauded. But that does not destroy the resulting trust growing out of the payment by one man of the purchase money of land conveyed by and to another. If that were so, then, although Hubbard paid the purchase money to Messenger, yet as all his title was derived through the conveyance from Messenger to Davis, even creditors could not reach the property.

XII. The fraud of Hubbard not communicated cannot affect the title of his innocent purchaser; purchasers from Hubbard were innocent of all knowledge of any fraud.

Rev. Stat. of Wis., (1838,) p. 615, sec. 4.
" " " 1849 p. 390 Sect 5

XIII. Orton claims that Butler purchased from Hubbard the property in question.

It is not pretended that any one was present at the purchase, or that any money passed between them, or that any writing was drawn; no particular time or place, in which the arrangement was consummated is given, but the whole rests upon the vague and conflicting statements of Butler, the fraudulent agent of Hubbard, and the ally of the defendant; and the alleged consideration is an indebtedness existing at that time in favor of Butler and against Hubbard.

1st. The interest of Hubbard was an equitable estate, which, under the statutes of Wisconsin, could only pass by deed.

Rev Stat. Wisconsin (1839) p. 102 Sect 6. Rev. Stat. of Wis., (1849,) p. 326 Sec. 1.
" " " " p. 388 " 6.

2d. It has been answered that the bond from Knab to Butler, executed by the direction of Hubbard, is a writing to convey Hubbard's estate within the statute. We will hereafter discuss the effect of the deed to Knab and bond to Butler in connection with the proof that Knab received by the way of security, &c., but content ourselves now with saying that it is not pretended that Hubbard personally gave direction for the bond; he personally requested Davis to make the deed; but Butler alone directed the execution of the bond. Knab testified that he did not know its contents, but supposed it to run to Hubbard; that it was understood between them all to be Hubbard's property. Ripley, who drew the papers, testified that neither as to the Schram lots nor as to this land did Butler disclose to him the interest

of Hubbard; so it was not intended as a conveyance of Hubbard's interest, nor was it by the personal direction of Hubbard. Butler could not be the agent of Hubbard in conveying to himself. The transaction must, therefore, stand as a parol sale, unsupported either by writing or consideration presently paid.

3d. The alleged consideration, a past indebtedness, did not exist.

It is not true that Hubbard owed Butler; on the contrary, the proof is conclusive that Butler was the debtor of Hubbard. The eight promissory notes of Butler to Hubbard are not simply evidence in contradiction of Butler's testimony, but are evidence *per se*. Had the contest been between Hubbard and Butler, they would have been the *highest* evidence. Orton, the subsequent assignee, is in no better condition, and they are equally evidence against him. Authority can hardly be necessary on this proposition, and, indeed, the declarations of Hubbard as to his having debts East (proven by the defendant) were admissible only on that principle.

These notes are for various sums; the first of them is dated August 11, 1845, and the last May 11, 1850, showing that during this whole period Butler was borrowing of Hubbard and giving his notes. We need hardly argue to the Court that such would not have been the case if Hubbard had been the debtor. These notes came from the possession of Lapham, Hubbard's administrator, and were therefore unpaid at Hubbard's death.

4th. We call the attention of the Court to our abstract of the testimony of Butler on this point, showing his different and conflicting statements as to the origin of the alleged indebtedness to him, its amount, and the character of the consideration. This conflict would have been impossible had not the whole story been a fable. These statements are in his answer to the bill of Hubbard, his deposition in Orton *vs.* Knab, and his deposition in this case. The two first are only evidence as impeaching his last testimony. In reading his testimony in this case, we ask the court to read the cross-questions, as thereby only can his evasion be seen or his full meaning known.

5th. In establishing this secret parol arrangement, by which an estate is divested, Butler is the only witness, and he becomes competent (if he is competent) only through his assignment to Orton. In the few cases where courts admit parol testimony to establish title in violation of the policy

of the statute, the testimony as against the alleged vendor (if he denies the sale) must be clear, distinct, and beyond a doubt; the mere probability of its truth is not sufficient. But in this case is another element, which makes it necessary that the transaction should be free from suspicion even.

Butler, in closing the transaction with Schram, in causing the papers to be made, and in all other things connected with the transaction, acted as AGENT for Hubbard, the latter not being personally present. The bond taken to himself was in fraud of the rights of his principal. And it is for Butler and his assignee to purge the transaction of the character of fraud which it bears on its face, by showing that the whole was just, fair and honest in every particular. Courts presume the fraud from his very character as agent.

11 Paige, 467. Ellis v. Brewer
3 Cowen, 537. Whelan v. Whelan
1 Johnson's Ch. Rep., 394. Barhydt v. Alexander.
6 ~~Ib., 543~~.
5 Paige, 650. Read v. Warner
16 Conn., 388.
2 Barr, [Penn.,] 463.
3 Mumford, 232.
Johnson v. Raey 3 Sandford Ch. R. p. 66
See also cases cited in 2d vol. of U. S. Equity Digest, p. 493.
Lacy v. Bank of Orleans 9 Paige 662

6th. Knab distinctly contradicts Butler as to the object of the bond, stating that he supposed it to run to Hubbard, and that between him, Hubbard, and Butler it was spoken of and considered to be Hubbard's property.

7th. The failure of Butler to communicate to the attorney drawing the papers the interest of Hubbard in any portion of the transaction is a badge of fraud. Knab, as well as Hubbard, was to be kept ignorant, and as it is to be presumed that the attorney was honest, he would (had he been informed) either have drawn the papers differently, or have called the attention both of Knab and Butler to the effect of the bonds. The Schram bond called for a title coming through Butler and Knab, and yet it is evident that neither of the parties really contemplated that, as within a few days after that date, Hubbard took a power of attorney to himself from Lewis F. Hubbard and Emily Jewell, and shortly afterwards a deed to himself from the parties, and finally perfected title in himself and conveyed to Schram. There was no concealment, so far as Hubbard was concerned, of his interest in

the lots and land. We find him frankly stating it to Schram, Knab, and others. The deeds to him were immediately recorded, so as to notify the world.

8th. The title to the lots was vested in several parties living far distant from each other in the East, and we may well imagine that informalities in the execution of deeds occurred, and that, with the incapacity of Hubbard for business, and his almost constant intoxication, much time must elapse before title could be perfected in him. Accordingly, we find the date of the clerk's certificate to the last deed to be June 1, 1850, and the date of Hubbard's deed to Schram to be July 4, 1850. During all this period Butler concealed his bond. The motive was evident. Butler *could* not perfect title, and Hubbard *would* not had he suspected how the papers were drawn. And without a conveyance to Schram the bond was worthless to Butler.

It will be recollected that Hubbard, although then having many unpaid notes of Butler's, loaned him (taking his note, which is still unpaid) the sum of $300 of the Schram money, thereby showing his great personal regard for Butler.

He certainly could have suspected no guile on the part of one to whom he was so much a friend, and therefore trusted to Butler that the papers should be right. Indeed, he was in that condition in which he could hardly have properly judged about them. It is evident that Knab was one in whom he could trust implicitly, as he had trusted Davis, and therefore he would not be uneasy from the absence of a writing to re-convey. Within a few months after the deed of Hubbard to Schram, Butler sold to Orton, who recorded the bond.

Hubbard must, within four months after that record, (which was in March, 1851,) have heard of it, as on the 5th of August his bill was filed.

XIV. The next defence of Orton is that he is a *bona fide* purchaser for the sum of $2,100. Record, p. 14.

This plea is entirely insufficient.

1st. He paid that sum in money and incumbrances on the Schram lots; but he does not specify the amount paid in money or that in incumbrances.

He neither specifies nor proves any incumbrances on the lots. Consistently with his allegation, he might have paid one dollar in money and the balance in incumbrances, or one dollar in incumbrances and the balance in money. He gives us no chance to anticipate the nature of the consider-

ation and meet it with proof. He does not tell us *when* or to *whom* he paid the incumbrances. He states he purchased the bond, but claims nothing else; the bond shows on its face that it was worthless. He claims that title of record was in Knab, *free, clear*, and unincumbered; and if his plea amounts to anything, it is that he supposed the absolute title to have been in Knab, and the whole right of Butler to have been ~~purchased~~ for the consideration mentioned in the bond.

The plea should have shown precisely what the consideration was, whether money or incumbrances, and when paid and to whom paid. Payments after notice of the rights of Hubbard are not sufficient.

Everts *vs.* Agnes and Swift, 4 Wisconsin, R., 354.
Story's Equity Pleadings, §§ 805, 806.

2d. The answer sets up a purchase by Butler from Hubbard, but does not state when Orton was notified of the purchase, nor does the plea allude to that defence. The defence is inconsistent with the plea.

3d. The plea is affirmative and should have been sustained by proof, but it is evidently false in fact. Had Orton paid any particular sum in money and another sum in incumbrances, he would have specified how much in money and how much in incumbrances, and would have stated and proved the character of the incumbrances.

On the contrary, he has failed to prove either that he paid any incumbrances, or that any existed. The only one referred to in the testimony is in the oral examination of Butler, who, when pressed to state the incumbrances referred to, mentions the McDougal judgment as the only incumbrance he can think of; and we proved that was never a lien, and was paid by the estate of Hubbard. We therefore conclude that no incumbrances were paid by Orton.

4th. The only proof in this case of the payment of money by Orton is the testimony of Butler. He states in his testimony in this case that Orton paid him, at different times, $1,200 in money; in his oral testimony he says he received $800 at one time, $300 at another, $200 at another, and $50 at another time. Orton, in his answer in this case, says, he paid in incumbrances and money; and that the money was paid at or about the date of the purchase, referring to but one payment; in his answer to the Hubbard bill, he makes no mention of money paid to Butler, but says he paid in money-obligations of said Orton, *claims* and *accounts* against

Butler, payments and *services* in fulfilling the bond to Schram, and payment of taxes and assessments on the TRACTS of *land*. We suppose the money-obligation referred to was the one given to Schram when Schram assigned his bond to Orton. The assignment of Butler to Orton was in March; that of Schram to Orton was on August 1st; and the bill of Hubbard was filed on August 5th. From this it will be evident that Orton procured this assignment of Schram while Hubbard was drafting his bill, and when Orton, from the notice given by Hubbard to Knab (not to convey) must have known that such a suit would be brought.

The bond of Schram was then worthless because Hubbard had fulfiled it, and Schram had accepted title from Hubbard. If Orton had paid any money to Butler, he would certainly have referred to it in the answer to Hubbard.

For particulars of the testimony on this point, the Court is referred to our statement of the testimony.

5th. Orton's plea shows that he relied upon the record, and that it discloses a perfect title in Knab. But the bond to Butler was for the consideration that Butler should, within a certain time, perfect title to the Schram lots in himself and Knab, and was for no other consideration and upon no other condition. That time had elapsed and the condition had not been performed, but the Record discloses that Butler never had any title, and that Hubbard himself acquired title to and conveyed to Schram.

This was notice to Orton either that his bond was worthless from entire failure of consideration and breach of condition precedent on the part of Butler, or that Hubbard was really principal in the transaction, so that his performance was performance by Butler and Knab, his sureties.

That knowledge would at once convert the rights of both Knab and Butler into a title by way of security. This we shall refer to in a separate point.

XV. As a continuation of the foregoing point, and yet as containing separate propositions applicable to this case, we shall copy from our former brief. Not only did the bond disclose on its face enough to notify Orton of a defence, but it gave him no rights, and was valueless in his hands.

1. Because he has not performed the conditions precedent upon which the right of Butler to demand a deed depends.

Knab and Butler gave a bond to Schram conditioned to procure, within three months, title from certain persons to

lots in the Second Ward to themselves, Butler and Knab, and to convey the same by warranty deed, with the title perfected, to said Schram. Knab executes the bond to Butler, reciting that he was mere surety for Butler on the first bond, and agreeing to convey to Butler the land in section 9 for the consideration that Butler should perform all and singular the conditions of the first bond. The fulfilment of the bond to Schram constituted a condition precedent to the right on the part of Butler to the land. But this condition precedent he had never fulfilled; he never procured any title to the lots in himself or Knab, and never gave any deed to Schram; but Hubbard, long after the forfeiture of the Schram bond, himself procured title and executed a deed to Schram, and the judgment of McDougal *vs.* Hubbard remained a lien upon the lots up to the time of payment out of the estate of Hubbard. Consequently all right at law to sue Knab upon his bond to Butler was absolutely gone when it was assigned to Orton. To show that a condition precedent must be performed, we cite—

Chitty on Contracts, p. 633.
Shaw *vs.* Turnpike Company, 2 Penn. and Watts, 454.
19 Maine Reports, 147.
2 Pickering, 155.
8 Cowen, 457. Dutch Church of Albany vs. Bradford
2 Dallas, 317.
19 Johnson, 69. Moakly vs. Riggs
4 Wash. C. C. Rep., 6.
2 Johnson, 207. Green vs Reynolds.

And here was no equity in the obligee behind the strict legal right conferred by the bond. Had he paid a full and valuable consideration for the bond, and by a mere delay in a point not material been in danger of losing what he had paid, that might serve in a proper case as motive to induce a court of equity to relieve against mere lapse of time. But the bond to Butler discloses on its face that he neither had paid or agreed to pay a single dollar for the land. The sole consideration was his doing what, as principal, he was bound in law to do, protect his surety against liability incurred in that character. It was therefore, on the face of the bond, against conscience to receive from Knab a deed of Knab's own land, because he had done Butler the favor to sign a bond for him. The right of the obligee was therefore a strict legal right, dependent upon the strict construction of the bond.

2. And in Chancery, as well as at law, a party in default is precluded from prosecuting others.

Colson *vs.* Thomson, 2 Wheaton, p. 336.
4 Johnson's Ch. Rep., p. 559. Hatch vs Pott
12 Ohio, p. 1.
4 Scammon, 202.
1 Johnson's Ch. Rep., p. 372. Benedict vs Lynch.
A. K. Marsh, 554.
7 Munroe, 651.

3. Courts of Chancery are not bound in all cases of LEGAL RIGHT to give a specific performance. On the contrary, if there is not an *adequate* consideration, or if there are any circumstances of hardship, they will turn the party over to his remedy at law.

2 vol. Story's Com. on Equity, ~~pp. 53, 54, 79, 80, 81, 84, and 86~~, §§ 750, 751, 769, 770, 771, 776, and 787.
18 *Vesey*, 149.
6 Johnson's Ch. Rep., 222. Lyman vs Delancy
2 Blackford, 431.
4 *Scammon*, 202.
1 Brown's Ch. Rep., 156.
2 Watts, 148.
Precedents in Chancery, 538.

In this instance the bond shows on its face that Butler was to pay no consideration for the land; that it was a mere bonus on the part of Knab to Butler for doing what the law compelled him to do at any rate. Therefore no Court of Chancery should enforce specific performance, even were the condition precedent performed.

XVI. Orton, by his suit against Knab alone, after he knew about the rights of Hubbard, and while Knab, in a suit by Hubbard *vs.* Orton, Knab, and Butler, was enjoined from conveying to Orton, could not improve his condition or obtain new equities as against Hubbard or his assignees. We shall therefore examine his rights as they stood at that time.

Mr. Orton appears merely as the assignee of a chose in action, and is bound by every equity existing against the obligee of the bond himself.

1st. Because the protection afforded by courts of equity to a *bona fide* purchaser for a valuable consideration is merely of a negative nature. It is a defence to be *set up* and *claimed* by way of plea or answer, and is a defensive, not an offen-

sive weapon. Courts simply refuse to *interfere* as against such a person, and leave each party just as it finds him to his legal rights; but here Orton (if he claims at all) must set it up not as a mere protection against equitable claims of others, but to aid him to obtain new rights against persons equally innocent with himself.

1 vol. Story's Com. on Equity, ~~***~~ Par 108-494
2 vol. Story's Com. on Equity, pp. ~~715, 716.~~ 1502-1503
Fonb. Eq., 412.

2d. Because even when interposed as a plea, *bona fide* purchase for a valuable consideration is not a good answer against a legal title.

1 Story, ~~sec. 631, note.~~ 1502 - 1503
3 Brown's Ch. Rep., 264.
Collins *vs.* Archer, 1 Russell and Mylne [E. C. R.] 284.
Wally *vs.* Wally *et al.*, 1 Vernon, p. 434.
Brown on Sales, 396.

3d. Because the assignee of a chose in action, as for instance, of a mortgage, is not protected as a *bona fide* purchaser.

11 Paige's Ch. Rep., 467. Ellis et al. vs Mercereau et al.
1 Paige, 319. Miller vs Miller's Exrs.
5 Shep., p. 310.
Scott *vs.* Shreeve, 12 Wheaton, 605.
10 Miss., 378.
2 Wash., 283.
2 Ohio, 400.
6 Halstead, 110.
1 Barbour, 114.
Vol. 1, U. S. D., p. 254.
1 Dallas, 23.
2 Dallas, 49.
5 Binney, 232.
4 Sergeant and Rawle, 177.

4th. Because all right at law was gone at the time of the assignment of the bond, as shown in the preceding point, and the right to come into a Court of Chancery would be a mere favor.

5th. Because the defendant is not shown to have made the proper inquiries.

Frantz *vs.* Brown, 1 Penn., 257.

6th. Because the record showed that Hubbard, and not Butler had conveyed to Schram; and the bond discloses the want of any consideration paid by Butler.

7th. Because the transaction between Orton and Butler, as disclosed by the bill and proofs, evidences fraud on the part of Orton as well as Butler.

XVII. The bond having been procured by fraud was void and should be set aside. Fraud avoids a contract, *ab initio*, both at law and in equity, whether the object be to deceive the public or one party, or one party endeavor thereby to cheat the other. For the law will not sanction dishonest views and practices by enabling an individual to acquire, through the medium of his deception, any right or interest.

Hazard *vs.* Irwin, 18 Pick., 95.
19 Howard, 331. Field vs. Seabury et Al.
Chitty on Contracts, 586, and cases there cited.
Ludlow *vs.* Gill, 1 Chipman, 63 or 49.
Gilbert *vs.* Hoffman, 2 Watts, 66.
Riddle *vs.* Murphy, 7.
Sergt. & Rawle, 236.
McChung *vs.* Lecky, 3 Penn. Rep., 94.
Chess *vs.* Chess, 1 Penn., 32.
Obeir *vs.* Hammel, 3 Harrison, 73.
Foxcroft *vs.* Devonshaw, 2 Burr, 931.
Bright *vs.* Eynon, 1 Burr. 390.
Livingston *vs.* Hubbs, 2 Johns. Ch., ~~119~~ 512
Evans *vs.* Edwards, 13 Com. Bench, 77.
76 Eng. Com. Law, 775.

XVIII. The Courts of Wisconsin hold that a deed absolute on its face, may by parol be converted into a mortgage; and that for this purpose it makes no difference whether the party claiming the rights of a mortgagee, himself conveys, or having the control of property, induces a third person to convey..

Sweet *vs.* Mitchell. 15 Wisconsin R., 664.
Platto *vs.* Roer, 14 Wisconsin R., 453.

And the same doctrine is supported by highly respectable authority in other States.

1 Paige, 147.
Roberts *vs.* McMahon, 4 Greene, (Iowa,) 34.
Davis *vs.* Hopkins, 15 Ill., 519.
Hoogland *vs.* Hoogland, 1 Greene Ch., 501.
Bottsford *vs.* Brown, 2 Johnson Ch., 416.
Bander *vs.* Snyder, 5 Barbour, (S. C.,) 63.

It is therefore clear by the proofs that Knab obtained only a mortgage interest in the property, upon the satisfaction of which it must revert either to Davis or Hubbard, (under both of whom complainant claims.) It is no answer to Davis's interest as mortgagee, that he did not expect the land to revert. He held it for Hubbard, and as to the management of that land made Hubbard his agent. Hubbard's will and intention were his. Hubbard made the arrangement with Knab by which Davis should give an absolute deed by way of security or mortgage. Fulfilling that arrangement, Davis gave the deed. The effect of Knab's receiving the deed under the arrangement is not changed by the ignorance of Davis of the nature of the transaction, since he trusted the whole to Hubbard, and allowed the latter to make the contract as he pleased.

If we should concede the bond from Knab to Butler to have been made with the consent of Hubbard, and apply to that paper the proof that Knab and Butler were both sureties in fact for Hubbard, but that to place Knab in a better condition it was agreed between Knab and Butler that the latter should also, as between the two, be primarily responsible, then the legal result of all the proof and of the papers would be that Knab obtained a mortgage interest, and agreed with Butler (who was also, as against Hubbard, only surety) that if he (Butler) should discharge the obligation to Schram, (and not Hubbard, the principal,) then that Knab's mortgage interest was to be assigned to Butler for his security. It will be recollected that it appeared on the face of the papers that Butler paid no consideration for the land, and was only to have it in case *he* should perform the condition of the Schram bond. But he did not, and Hubbard did, and of this Orton, by the Record, had notice; therefore, all that Knab held or could transfer either to Butler or Orton was a satisfied mortgage.

XIX. The bill of Orton *vs.* Knab and the decree (Record, p. 115) in the Supreme Court are both based on the idea of Butler's being a purchaser from Knab, with no equities back of the bond, the consideration being his performance of the condition of the Schram bond, alleged both in the bill and decree to have been by him.

The performance is shown here in fact to have been by Hubbard, and although, as between Knab and Butler, that might have been sufficient and considered as the act of Butler, yet such is not the case as between Hubbard and Butler.

It would be the ordinary case of one person receiving title and the other paying the consideration; there would be the resulting equity in favor of Hubbard. Orton knowing the facts, as assignee of Butler, could be in no better situation; and he is estopped, by the Record under which he claims, from setting up any other rights.

XX. Although we consider the decision of this Court in 21 Howard as settling in our favor most of the points raised on our former brief, as a matter of precaution we will add the following propositions taken substantially from our former brief:

The purchaser of an equitable interest, although it is at the time of the purchase disputed and denied by the trustee, obtains the same right of action and is protected by a court of equity in the same manner as his vendor the original *cestui que trust*; a court of chancery imposes no restraint on such sales; therefore the complainant is at least in as good a position to enforce his rights as Hubbard would have been.

Story, Com. on Eq., par. 1,040, *et seq.*
Baker and Whiting, 3 Sumner, p. 375.

XXI. The policy of the law is, that the legal and equitable estate in lands should be united, and that the equitable owner should hold it without being harassed or embarrassed either in the improvement or sale of them by the *legally* or equitably unfounded claims of others.

Revised Statutes (1849) of Wisconsin, p. 417, sec. 34.
Ib., p. 641, sec. 5.

And so long as both an equitable and legal estate exist in a party, joined with possession in the law, he can claim the advantage of the statute; it is a right annexed to the *estate*, and not the person. It is therefore immaterial how the owner acquired such estate, or how much he paid for it; it is enough that he has it, and every claim to it unfounded in the law is an injury for which the statute gives redress. The more plausible the claim and the more intricate and hard to prove the title of the owner of the land, the greater is the wrong and the stronger the necessity for the interposition of a court. Courts may be doubtful as to the applications of law or the existence of facts, but theoretically, at least, there is no such thing as a doubtful estate in lands; they belong positively to some one, with every right of enjoyment annexed to such estate.

XXII. As the decision in the case of Orton *vs.* Smith, already referred to, may perhaps influence the opinion of the court in this case, it may be well before discussing the question above raised, to show wherein the statements of the bill sustained by proof have avoided the supposed facts upon which that decision was based. The bill shows that—

1. The suit in the State Court is fully terminated in all its details.

2. The complainant in that suit fraudulently brought it against one known to have no interest in the premises, refusing to make Hubbard or his grantees parties.

3. Under the pleadings in that suit no issue as to the rights of Hubbard could be or was raised.

4. The court in that case expressly refuse to pass upon the right of Hubbard or his grantees, and based their decison upon the pleadings of Knab and his personal inability to set up against his own act a fraud practiced upon third persons.

5. Neither Hubbard nor his grantees being parties to that suit, their rights as strangers could in no manner be affected by it; their only interference in it was by persuading Knab to take such testimony as would compel Orton to make them defendants, so that by proper pleadings and proof they might set up their rights, or in case of a refusal induce the court to dismiss the bill for want of parties.

6. The court did dismiss the bill and thereby even as to any supposed legal interest derived from Knab himself, the *lis pendens* ceased, and the complainant had in himself and could give to others even that supposed legal title; without being affected by the former pendency of a suit, Knab himself could have conveyed all his interest.

7. The appeal taken by Orton sixty days after the dismissal of his suit by the Circuit Court, without notice to the complainant in this suit, or making him a party thereto, was the commencement of new proceedings against Knab alone after he had parted with all, even apparent interest in the premises; the decree of the Supreme Court on the appeal was therefore a nullity as to persons purchasing from even Knab, prior to the appeal.

8. The complainant paid a valuable consideration, and debts of Hubbard were paid partially out of money received from complainant; the deed executed by Davis was at the request of the administrator to avoid any defence to a mortgage given by Gruenhagen for purchase money.

9. Hubbard conveyed to Gruenhagen (grantor of complainant) before suit commenced, either by himself or Orton; and the complainant was not a purchaser of the equitable estate

pendent lite, nor has there ever been a suit in the State Court in which the equitable rights of the complainant, or of his grantors of the equitable estate, could be litigated.

10. Neither the bill nor proofs show that Hubbard kept property in the names of third persons to avoid debts; but if such were the case, (as supposed by the court in their opinion in the first case,) that would render the position of the complainant better, because the statutes of Wisconsin give to the subsequent purchaser from the fraudulent debtor the same right as creditors to set aside the first conveyance.

Revised Statutes, page 390, sec. 3.

XXIII. If the court conclude that Knab held the naked legal estate in trust (not a mere satisfied mortgage interest) and that by the decree, even as against the prior grantee of Knab, such legal title passed to Orton, then Orton would unite in himself the rights of his fraudulent assignor, Butler, and of Knab as holder of the naked legal estate, and would be in precisely the same situation as Butler would have been had Knab voluntarily conveyed to him. The rights of Hubbard, the principal and *cestui que trust*, would not have been cut off or affected. Orton as well as Butler would become thereby the mere trustee, and clearly a court of equity would sustain a bill of Hubbard to compel a conveyance from his fraudulent trustee.

XXIV. We have thus far considered the instrument set up by the complainant as a single instrument. But the deed from Davis to Knab bears date and was delivered on the same day with the bond. The bond is an instrument in writing showing that Knab received the land as a mere security and not as a purchaser, and consequently, both by the Statutes of the Territory of Wisconsin and by equity rules, he had simply a mortgage.

Revised Stat. of Territory, p. 181, § 18.
1 Peters, 386.
12 Howard, 139,
9 S. & R., 434.
20 Ohio, 581.
3 Watts, 188.
32 Maine, 143.

The deed and bond were improperly recorded amongst deeds, and should have been recorded amongst mortgages. By the improper recording, Knab would have lost even his mortgage interest as against a purchaser from Davis without notice. (See Statutes above cited.)

XXV. Knab being simply mortgagee, could convey no title to the defendant, and by the discharge of the mortgage, either by release or by a satisfaction of the terms on which it was taken, the property reverted to the mortgagor, Davis. There are two parties to every mortgage, the mortgagor and mortgagee; the one at common law possessing the legal estate, the other the equity of redemption. (See history and origin of Mortgage, 1st vol. Greenleaf's Cruise, title 15, p. 64; also 67 and note definition; also 68; also page 70, sec. 24.) Consequently the equity of redemption remains in Davis, either for his own use or that of Hubbard.

And under the modern doctrine as to a mortgage, both at law and in equity, the mortgagee, Knab, had neither *jus ad rem* nor *in re*, but a lien upon upon the land—*Story's Agency*, sec. 354; 3 *Denio*, 232, (opinion of the court, 234,)—and consequently could convey no title to Butler.

XXVI. If Knab had been capable of conveying the legal title, and had absolutely conveyed to Butler, (the condition precedent of the bond or defeasance being satisfied,) Butler on the face of the Record would have had only a legal estate in trust for Davis, inasmuch as the want of consideration paid by Butler would have appeared on the face of the papers. It would have appeared that Davis conveyed to Knab to secure Knab against a liability incurred as surety for Butler, and that Knab conveyed without consideration to Butler. The deed could recite no consideration in the law and could not be supported as a deed of bargain and sale.

2d vol. Story's Com. on Equity, p. 440, 1, 2, 3, 4, 5, sec. 1,197, 1,198, 1,199, 1,200, 1,201.

As this doctrine is too well established to admit doubt, it is deemed unnecessary to cite anything more than elementary works to sustain it.

XXVII. The bill distinctly charges Orton (and the proofs establish it) with having brought his action in the State Court agninst Knab alone, with the full knowledge that he had no real interest in the premises, and that Hubbard was the equitable owner.

And as Orton appears before the court, he is a mere volunteer and ally in fraud of Butler; if he had paid a consideration for the assignment, or had in any way acted in good faith, or was desirous of that protection, he was bound so to allege in an answer and satisfactorily to prove it. But the mere filing a bill in the State court against Knab alone, and that too while

in a suit against himself and Knab by Hubbard, Knab was enjoined from executing a voluntary conveyance, and his refusal upon request to make the *cestui que trust* a party, for the very purpose of preventing a proper defence by a party in interest, are such badges of fraud as it would be difficult to explain. The fact that Hubbard's suit was erroneously commenced in his name after he had conveyed to Gruenhagen and was therefore discontinued, does not relieve the character of Orton. The bill likewise charges facts (sustained by proof) showing that Orton must have known, prior to the assignment of the bond to him, the entire want of consideration moving from Butler, and also the interest of Hubbard.

XXVIII. This is not merely a bill of peace.

It is a case of fraud practiced upon the equitable owner of real estate, by his agent, in obtaining a bond from one apparently holding the legal title.

It is clear that if any portion of the legal title had passed to Orton, the only remedy is in chancery. But if, since the fraud, the entire legal and equitable title have been united in the complainant, still the bond and subsequent decree, and the claim of title of Orton, are a fraudulent obstruction to the rights of the complainant, and a court of equity is the proper tribunal to pass upon the fraud. The peculiar equitable nature of the title of Hubbard, and of the suit of Knab, make this the only proper tribunal to dispose of all the question.

We again call the attention of the court to the distinct allegation that Hubbard knew nothing for years subsequently, as to the bond taken by Butler, and that even Knab was entirely ignorant of its contents, and in fact of its existence, except from the fact of having signed something, which, because Butler was Hubbard's agent, he supposed was right.

The case cited from 2 Sumner, p. 375, is also an authority on jurisdiction.

JAMES S. BROWN,
Attorney and of Counsel for Appellant.

Supreme Court of the United States

OF AMERICA.

GEORGE SMITH, Appellant,

vs.

JOHN J. ORTON Appellee.

Appeal from the Circuit Court of United States for the District of Wisconsin

ARGUMENT OF THE APPELLANT.

By an examination of the bill, exhibits, answer and evidence in this case, the following statement of the facts will be found to be corrret.

That on the 22d day of July, 1848, one T. D. Butler and one David Knab, executed to one Joseph Schram a bond conditioned in substance to obtain and convey to Schram a part of lots 5 and 6, in Block 43, in the City of Milwaukee, State of Wisconsin, clear of incumbrance within three months. That to indemnify and secure the said Knab for entering

into this bond, Butler procured a conveyance from one Cyrus D. Davis and wife, to the said Knab of lots 7 and 8, of Section 9, Township 7, North of Range 22 East, in the County of Milwaukee, except a small fraction on the 20th day of July 1848, and on the 22d day of said month, the said Knab executed to the said Butler a bond, conditioned in substance for a conveyance to him, Butler, of said lots upon his performance of the conditions of the said bond to Schram.

That on the 22d day of February 1851, the said Butler sold to the appellant Orton, his interest in said lots 7 and 8, in consideration of the sum of $2,100, and assigned to said Orton the said bond from Knab, and the said Orton afterwards satisfied certain incumbrances upon said lots 5 and 6, which had been before conveyed to Schram by the persons having the legal title to the same; and the said Schram cancelled and delivered up to the said Orton, said bond of Butler and Knab as satisfied and discharged. Thereupon Orton demanded a conveyance of said lots 7 and 8, from Knab according to the condition of his bond to Butler, and Knab refusing, Orton filed his bill in the Circuit Court of the County of Milwaukee, for a specific preformance of said bond, against Knab, in which suit, upon an appeal to the Supreme Court of the State of Wisconsin, the said Orton obtained a decree of specific performance, from said Supreme Court, at December Term thereof 1854, to which decision the Court is referred, as an authority in this case.

It further appears that the legal title to said lots 7 and 8, had been held by one Messenger, by whom it was conveyed to Davis, and no adverse title or interest in the same in writing or by record had ever appeared, and that the appellant Orton had never had any notice either actual or constructive of the existence of any adverse title or interest in the same whatever.—Such notice as well as all the fraud and conclusion charged in the bill, are distinctly denied in the answer and are not proved in the evidence.

Against these facts, which so plainly in themselves entitle the defendant Orton to a decree in this case, it is set up in the bill and attempted to be sustained by the evidence, that one Otis Hubbard, had for many years owned these lots 7 and 8, and had lodged in the hands of Messenger, Davis and others, the legal title, as trustees, and that although Hubbard had never held the legal title himself, he had in fact been the cestiu que trust, in all the wanderings and gyrations of the legal title in the hands of others up to the conveyance to Knab. Hub-

bard caused the title to be held by Messenger for his benefit, directed Messenger to convey to Davis, and Davis to Knab.

This trust in Hubbard, was simply an implied or resulting trust, and rested wholly in parol—no persons other than Messenger and Davis knew anything of it, and the conveyances were so made, and the sales from one to another, and especially from Messenger to Davis, were invested with such apparent bona fides and fairness, by the giving of notes for the consideration, etc., as to lead all others except the immediate parties themselves to believe that there was no other interest or title except what appeared by the conveyance. Knab himself did not know when he received the title from Davis, that Hubbard owned or had any interest in lots 7 and 8, for he says in his testimony on page 26th of the case, that "Hubbard sometimes represented the lots as the property of one person, sometimes of another," and it was Butler who gave him the deed from Davis. All the title the appellee in this case, claims to lots 7 and 8, comes from the said Hubbard, by virtue of this resulting trust, in opposition to the legal title which should, and in law does follow the bond given by Knab to, and now held by Orton the assignee. It is further claimed by the complainant, that Butler did not own the lots, had never bought them of Hubbard or any one else, had paid no consideration for them, and had no right to take the bond back from Knab, for their conveyance to him, and that in so doing, he defrauded Hubbard, and that Orton paid no sufficient consideration to Butler, etc.

The answer of Orton, and the evidence of Butler, Davis and Knab, sufficiently controvert these allegations in the bill. They concur in showing that Butler purchased the land of Hubbard, had paid him for it, previous to the execution of the bond, that it was by his direction and with his knowledge and consent that Knab gave the bond to Butler, that the title upon the performance of the conditions of the Schram bond should not go back to Davis, or be given to him (Hubbard,) or to any one else, except to Butler.

That Orton paid a full consideration to Butler for the lots, and the assignment of the bond; that Orton was an innocent purchaser, and without notice of any interest in Hubbard, and the evidence of Ripley shows that Knab, at the time, knew well the nature of the bond he gave to Butler, and that Butler took it with the consent of all the known parties to the transaction. It further appears that, notwithstanding the bond and assignment were both recorded, and that Hubbard thereby had

constructive notice at least of both, and that he had actual notice of the giving of the bond to Butler, and that it was done with his direction and consent; Hubbard by his silence and by the lapse of time afterwards, before setting up any claim to the lots himself, confirmed it, and is estopped from denying the rights of Butler and Orton.

Again it appears from the evidence of Davis, Messenger, Butler and Pettibone, that if Hubbard had any interest in these lots at any time, he had concealed it, by placing the title in the hands of third persons to defraud his creditors, and that this purpose to defraud, was the only reason, motive or intent, in thus keeping the title out of his own name.

It is presumed that this fact will not be disputed in the argument, for it is made to appear by the evidence taken by both parties.

These are the facts, material to the merits of this case.

It may by contended, that the giving of the deed to Knab, and the receiving of a bond to Butler, at the same time, made the bond a mortgage, (and it was so contended in Court below, upon the hearing,) and that the sale of the bond to Orton, was therefore not the sale of land, but of a chose in action, and that Orton consequently cannot be protected, as a bona fide purchaser without notice.

Suppose the bond had been given by Knab to Hubbard, instead of Butler: and Orton, had bought the land of him and taken from him an assignment of the bond; then would it be contended that Orton took nothing by the translation but a chose in action? It is presumed that this would very materially alter the case, in the estimation of the Complainant's Counsel. But the bond in such a case, is merely evidence of the defeasance of the deed, and the deed and not the bond, is the mortgage.

Hughes vs. Edwards, 9 Wheat, 489. 1 Hilliard on Mortgages, 12.
Stewart vs. Hutchins, 6 Hill. 143.

So that if the conditions of the Schram Bond had not been performed by Butler, and Knab had lost anything, or been damaged by the failure, he could use the security placed in his hands by the deed, to indemnify himself, and for that purpose he could foreclose it as a mortgage, but if the conditions of the Schram bond are satisfied and discharged, and Knab therefore released from liability upon the same, he must surrender up his security, or in other words he must discharge and cancel his mortgage.

In such a transaction, the holder of the Deed is the mortgagee, and the holder of the bond is the mortgagor when the mortgage is satisfied, and discharged, the mortgagor is entitled to the land, without the incumbrance.

In view of this position, Orton the appellant, is the purchaser of the title of the mortgagor, subject to the mortgage, by becoming the asignee of the Bond ; and when he pays and satisfies the mortgage debt, or liability, he is entitled to the land, clear of the incumbrance, and in this respect, he could file his bill to redeem, or for a specific performance of the bond to re-convey, and in either case, his remedy and his right would be the same. It is fallacious to contend that Orton in this case, is not the purchaser of the land from Butler, by becoming the assignee of the bond, and is not entitled to the same protection as a bonafide purchaser, as if Butler had held the Deed instead of the bond and had conveyed to him, instead of assigning the bond.

It may be contended, that according to Butler's evidence, his purchase of the lots from Hubbard, was by parol, and therefore void by the Statute. But it will occur at once, to a legal mind, that reflects a moment upon the facts of this case, that the giving of the bond to Butler by Knab, by the direction of Hubbard, to consummate the sale before negotiated by parol, placed the same in writing by a formal and solemn instrument and that the purchase is not by parol.

Will it be contended, that when a cestiu que trust, directs his trustee to convey the trust property to a third person to whom he has before sold it by parol, and the trustee does so convey, that the sale is void by the Statute and the purchaser takes nothing by the sale, because no writings are passed between the cestiu que trust and the purchaser ? If so, then, how stands it, with the conveyance from Messenger to Davis and from Davis to Knab ? Neither Davis nor Knab received any writing signed by Hubbard, therefore they never had any title. If a sale is consummated by a conveyance of the property by the person holding the title, whether by the person from whom the purchase is made or by any one else by his direction, it is out of the Statute, and is valid.

Cadwell vs. Carington 9, Peters 86.

The appearance of several notes in evidence, given by Butler to Hubbard, will be sought to be used to weaken or destroy the evidence of Butler, as to his payment for the lots.

When Butler testifies, on page 45 of the case, that " Hubbard had

expressed his intention to convey to him some property, and the Bond referred to in his answer was executed in pursuance of his directions to carry such intention into effect," and that "Hubbard owed him for money and merchandize previously received by him, (Hubbard) from him, (Butler) about eight hundred dollars," and that "the indebtedness commenced in 1843," and that "he could not give the items of such indebtedness for the reason that his books of account were stolen," and on page 46, that "Hubbard boarded with him off and on from 1843 to 1850, as much as three fourths of the time;" it is to be presumed he took into account these notes, and it is perfectly consistent with the fact that Hubbard still owed him what would, between them, be considered a fair consideration for the land over and above these notes, $800 for money and merchandize, in addition to many years board would make an adequate consideration, over and above the notes. Inadequacy of consideration will not defeat the sale as fraudulent for that reason alone, although it may be a fact among others to be submitted to a jury to prove fraud.

1 Story's Equity, § 245.
2 Hovenden, 14.

In addition to the clear equities and rights of the appellee, arising at first blush upon the facts of the case, the following legal considerations applicable to those facts are presented.

1. If Hubbard had any interest in lots 7 and 8, it was merely an implied and resulting trust, resting in parol, and cannot be set up to defeat or prejudice the title of a purchaser, for a valuable consideration, and without notice of such trust.

Revised Statutes of Wisconsin for 1849, page 318, Sec. 10.

2. The bill prays to have the bond from Knab to Butler, and assigned to Orton, declared fraudulent and void. And thus makes an affirmative allegation of fraud, which cannot be presumed, but strictly proved.

1 Story's Equity, § 190.

3. The most that can be claimed by the complainant is, that when Knab held the deed of lots 7 and 8, he was trustee for Hubbard. Then if Knab thus holding the legal title, gives a bond to convey to Butler, with or without the consent of his cestui que trust, he will be required to perform his agreement in specie.

Hall vs. Warren, 9, Vesey 605,
Mortlock vs. Butler, 10, Vesey 314.

Hyde & Brown vs. Kelly, et. al. 10 Ohio 215.
Champion vs. Brown, 6, John. ch. R. 398.
Merroy et. al. vs. Ballou et. al. 1 John, ch. R. 565.
Edwards vs. Van Bibber, 1 Leigh, 183.
Hines vs. Barde, 1 Sm. & M. 530.

4. If Hubbard kept his title in the names of others, and finally in the names of Knab and Butler, and kept his interest in the property conceived by this means, to defraud his creditors, he has no remedy nor has his grantee, even against the party thus fraudulently holding the title.

Warburton & King vs. Alken & Little, 1 McLane, C. C. R. 460.

5. Much less has Hubbard or his grantee, a remedy against an interventing purchaser, without notice of the legal title.

A bona fide purchaser without notice from a grantee, to whom property has been conveyed to defraud creditors, is entitled to hold the same even against the creditors of the grantor.

Bean vs. Smith, 2 Mason, C. C. R. 252.

6. Conceding for the purpose of the argument, that Butler obtained the bond from Knab in fraud of Hubbard, and that he obtained it fraudulently of Knab, and thus become ostensibly the owner of the property, upon the performance of the conditions of the Schram bond, then if Butler sold the property and assigned the bond of Orton, for a valuable consideration, and Orton had no notice of the fraud between the parties, Orton will be protected in the enjoyment of the title.

A *bona fide* purchaser for a valuable consideration, without notice of any fraud in the grantee to his vendor, shall hold the estate against the original grantor and his heirs.

Dexter vs. Harris, 2, Mason, C. C. R. 531.
Fletcher vs. Peck, 6 Cranch, 133.

7. If Hubbard holding an adverse title to the paper title in the hands of another, stands by silently and is apprised that a purchaser is buying the paper title, the purchaser will be protected.

1 Story's Equity, § 376.
Bank of the U. S. vs. Lee et. al. 13, Peters 101.

So also if Hubbard kept his title secret for fraudulent purposes.

1 Story's Equity 379.

8. Suppose Butler in this transaction in holding the bond, acted as the agent or trustee of Hubbard, under secret instructions, and Butler should sell to a purchaser ignorant of this fiduciary capacity and of

these instructions then query, would not the purchaser be protected?

Where the full legal title to land is lodged in the hands of an agent or trustee, and there is nothing in writing or parol apparent, showing the purpose for which the title is thus placed, and the agent sells the property to a third person without notice of the agency or the trust, such an agency would be the most general and unlimited that can be imagined, and such a trust would be accomplished by the most unlimited power, and the principal and cestui que trust would be bound by the acts of the agent or trustee.

In consideration of these well established legal principles, and of the facts, that it is proved, that Hubbard consented and directed the bond to be given to Butler, that Butler paid Hubbard for the land, that Orton paid Butler a full and valuable consideration for the land and the bond, and had no notice that any other person had any interest in the property, except those appearing in the deeds and records of title; and that if Hubbard had any interest at all, he had always concealed it to defraud his creditors, there can be no doubt, that the bill should be dismissed, and Orton restored to his equities and his rights.

Instead of the complainant's proving the frauds that he has alleged in his bill, and establishing a resulting or implied trust in opposition to the title of Orton, he has on the contrary disclosed a fraudulent debtor to a Court of Equity, and stands in the very inequitable position of grantee of this long concealed interest before the Court asking a *bona fide* instrument of title, in the hands of an innocent purchaser, to be declared fraudulent and void. It is believed that a Court of Equity will never aid and protect fraud, by giving its solemn sanction to the corrupt fountain of such a title, as the complainant presents in this case, to set aside and declare void an instrument untainted and *bona fide*.

The case of Orton vs. Knab 3 Wis. 576, is decisive of this case.

Every fact appearing here that is at all material, was distinctly passed upon by the Supreme Court of Wisconsin in that case. The Circuit Court dismissed the bill solely on the ground, that Hubbard should have been made a party, and from the testimony of Brown, it appears that Messrs. Brown and Ogden were substituted as counsel in the place of Jenkins, at the instigation of Smith, for the purpose of insisting that Smith should be made a party in the Supreme Court, and that Court decided that Smith had no such interest as would entitle him to

be made a party, and his interests appeared in that case, if he had any, the same as this, and upon the same facts.

If Smith has any equitable interest as claimed, he never having had any possession, he cannot set it up as against the legal title.

McMahon assignee &c. vs. Allen 34 Barbour, 56.

This Court has already virtually decided this case.

Smith vs. Orton, 18 Howard 263.
do 21 do 241.

The attention of the Court is respectfully invited to the opinion of Judge Miller, herewith submitted, as an able and conclusive argument against the appellant.

GEORGE SMITH,
vs.
JOHN J. ORTON.

"The original suit between these parties was essentially a bill of peace to remove an alleged cloud. Considering under the statute of uses, Otis Hubbard, the beneficial owner of the premises, his deed to Gruenhagen of the 7th June, 1851, might vest in him and his grantees sufficient right to maintain this bill. But the Supreme Court of the U. S. (18 Howard 263) decreed that "those only who have a clear, legal and equitable title to land, connected with possession, have a right to claim the interference of a Court of Equity, to give them peace, or dispel a cloud on the title. And also that Courts of the United States should not entertain a bill of peace upon a title in litigation in a State Court." A suit being then pending in the Circuit Court of Milwaukee County of John J. Orton vs. David Knab, involving the question of the title to the lands, in dispute in this bill in this Court. That suit having been finally determined by the State Court in favor of Orton before the decision of the appeal in the Supreme Court of the United States, that Court reversed the decree of this Court, with mandate to this Court to dismiss the bill, but without prejudice. This bill being filed, it was dismissed on demurrer without argument, and without having been read or submitted to the judicial consideration of the Court. From that order the complainant appealed to the Supreme Court of the U. S., when, on argument, there was a reversal with mandate to this Court to proceed in the cause.

This bill sets forth the final decree of the Supreme Court of the State in favor of Orton, and the deed made to him in pursuance of said de-

cree. This is a suit for the title, praying that Orton may be decreed to convey or release his legal title to complainant, as the holder of a superior equity. I have carefully examined the pleading and the proofs, which I find, as to the conveyances and the accompanying circumstances, substantially as in the former case. Some oral testimony was taken in Court at the hearing, under objection as too late under the rule, and not authorized by the present rules of the Supreme Court for Chancery practice. Being under the belief, that the rules, particularly the rule of March, 17, 1862, (which directs that either party may give notice to the other, that he desires *the* evidence to be adduced in the cause to be taken orally, and thereupon *all the witnesses* to be examined, shall be examined before one of the examiners of the Court, &c.,) abrogated the act of April 25, 1802. 2 statutes at large 166.

That act requires, that testimony may be taken according to the laws of the State. And the constitution of this state directs, that the testimony in cases in equity shall be taken in like manner as in cases at law. Until the adoption of the late rule I considered the act of 1802 binding in this court, and took testimony in open Court when demanded by the parties. The testimony taken at the hearing was taken for the purpose of submitting this matter to the Supreme Court on appeal from our decree, and I have so noted it. I have not referred to that testimony in my examination of the case, but disallowed it by order at the foot of Mr. Brown's deposition. In examining the case with reference to the two opinions of the Supreme Court of the United States in 18 and 21 Howard, I find that there is nothing left for this Court to decide. In the first case the Court gave no effect to the deed from Hubbard to Gruenhagen, as Davis then held the legal title in secret trust for the creditor's of Hubbard.

As to the allegation of fraud in Butler taking the bond to himself without consideration, the Court in the first case say: "The charge of fraud made in the bill, because Knab's title bond was made to Butler, and not to Hubbard, is not substantiated. It was a matter of indifference to Knab whether Hubbard or Butler held the land. He had no concern with the private arrangements or secret trusts between them.—When the consideration of his bond to Schram was released, Knab was bound to convey to Butler by the exigency of his own contract, and could not make himself a judge of the equities between Butler & Hubbard. His assignment to Smith, under the circumstances, could have

no effect but to substitute Smith in his own place, under the same liabilities." During the pendency of the bill (in the State Court) which would settle the legal title and equitable rights of all parties having any claim to the land in dispute, the complainant Smith became the purchaser of the real or supposed secret equity of Hubbard. And not only so, but he has obtained from Knab the transfer of the legal title for a nominal consideration. Thereby substituting himself in the place of Knab in the contest pending in the State Court." Again, in the same opinion: "The complainant in this case is the volunteer purchaser of a litigious claim; he is the assignee of a secret equity for apparently a mere nominal consideration, and of the bare legal title for a like consideration. This legal title was improperly assigned to him during the pendency of a suit in Chancery to ascertain the person justly entitled to it." On the present bill the Court say: "Smith obtained a deed from Davis, and also one from Knab, but as Davis had no interest, having long previously conveyed to Knab, nothing passed by his deed unless as is assumed by the bill, an equity of redemption resulted to Davis."

As Orton had filed a bill in a State Court against Knab which was pending when Smith took his own deed from Knab, and as Knab was not allowed to disown his own bond, Orton got a decree against Knab for a conveyance of the legal title, (which conveyance was regularly made,) and therefore the deed from Knab to Smith was of no value.—Having been made while the suit was pending, it could only have any useful effect in the contingency of Knab's successful defence. Orton having succeeded, his decree related to the commencement of the suit, and gave him the older and better legal title. Smith's deed being subservient to the rights of the parties in litigation, (1 Story Com. Eq. § 406,) Orton had the legal title beyond dispute." It is further said in the bill, "Butler certainly had neither a legal nor equitable interest in the property when he sold to Orton. He held Knab's title bond with full knowledge that Knab held in trust for Hubbard. And this bond was assigned to Orton. In the first case, "This deed (the deed from Davis to Knab) was put on record by Knab, who at the same time gave his title bond, covenanting to convey the land to Butler, when the covenants of their bond would be satisfied or released. This title bond was not given to Davis, because he claimed no beneficial interest in the land, nor to Hubbard, because his policy required him not to appear to

have any title to property, but to Butler, the friend and active agent of Hubbard. Notwithstanding the testimony of Butler, that he paid Hubbard for the land, and did not hold as secret trustee for him, the fact may be considered doubtful."

It is strongly pressed that Butler did not pay Hubbard for the interest claimed by him, as entitling him to take the bond from Knab in his own name. But from the view taken of Orton's rights, under the assignment of the bond to him, and the decree of the State Court, that matter seems to be immaterial as to Orton. In the last opinion the Court say, what effect Orton's decree against Knab may have to protect Orton under the legal title on a plea of *bona fide* purchasers of an equity, we decline to decide; nor will we discuss the question, as this case may again come before this Court, and involve that question. That question is raised in the answer in this case, and it was also in the first case. The Supreme Court in that case decided the question thus: "On the 22d February, 1851, Butler assigned to Orton, the defendant, the title bond of Knab for the consideration of $2,100. This consideration has been paid without any knowledge or notice of any secret equity in Hubbard, and the covenants of the bond to Schram being fulfilled or released, Orton filed his bill in Chancery on the 6th August, 1851, against Knab, demanding from him a conveyance of the legal title according to the exigency of the bond." Such being the position of the Supreme Court of the United States in respect to this controversy, there is no alternative left to this Court but to dismiss the bill, leaving it to that Court to finally dispose of the case on an appeal."

H. S. ORTON,
Counsel for the Appellee.